84-1159

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Karole K. Jensen, as
Administratrix of the
Estates of Sylvia Brown
and Michael Clark, Deceased,

Petitioner,

v.

Virgil L. Conrad, et al,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

APPENDIX
VOLUME I

COUNSEL OF RECORD ARE:

O. Fayrell Furr, Jr.
LAW OFFICES OF O. FAYRELL FURR, JR.
Post Office Box 2909
Myrtle Beach, SC 29201

ATTORNEY FOR PETITIONER

William C. Hubbard
Joel H. smith
NELSON, MULLINS, GRIER &
SCARBOROUGH
Post Office Box 11070
Columbia, SC 29211

LEAD COUNSEL
ATTORNEYS FOR RESPONDENTS
Commissioner and Members
of the State Board

Wilburn Brewer, Jr.
James L. Werner
NEXSEN, PRUET, JACOBS
& POLLARD
Post Office Box 2426
Columbia, SC 29202

ATTORNEYS FOR RESPONDENTS
County Director and
County Board Members

George Beighley
RICHARDSON, PLOWDEN,
GRIER & HOWSEER
1340 Pickens Street
Columbia, SC 29201

ATTORNEY FOR RESPONDENT
Patricia Jones

Charles E. Hill, Jr.
TURNER, PADGET, GRAHAM
& LANEY
Post Office Box 1473
Columbia, SC 29201

ATTORNEY FOR RESPONDENT
Mary Williams

David Robinson, II
ROBINSON, McFADDEN, MOORE,
POPE, WILLIAMS, TAYLOR
& BRAILSFORD
Post Office Box 944
Columbia, SC 29202

ATTORNEY FOR RESPONDENT
Barbara Locklair

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Karole K. Jensen, as
Administratrix of the
Estates of Sylvia Brown
and Michael Clark, Deceased,

Petitioner,

v.

Virgil L. Conrad, et al,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

APPENDIX

INDEX

	Page
Opinion of the Fourth Circuit Court of Appeals (entered October 5, 1984).....	1
Order of the United States District Court for the District of South Carolina at Columbia (entered March 4, 1983).....	58
Supplemental Order of the United States District Court for the District of South Carolina at Columbia (entered July 18, 1983).....	96
Order of the United States District Court for the District of South Carolina at Anderson (entered June 16, 1983).....	150
Order of the United States District Court for the District of South Carolina at Anderson (entered August 24, 1983).....	204
Order of the United States District Court for the	

District of South Carolina at Anderson Granting Virgil L. Conrad's Motion for Summary Judgment (entered August 24, 1983)..... 200

Order of the United States District Court for the District of South Carolina at Anderson Directing Clerk to Enter final judgment (entered August 24, 1983)..... 202

S. C. Code Ann. Sections 20-7-480 through 20-7-736 (1982 Cum. Supp.)..... 232

Child Protection Act of 1977. 291

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-1801 (L)

Karole K. Jensen, as
Administratrix of the
Estate of Sylvia R. Brown,
Deceased,

Appellant,

vs.

Virgil L. Conrad, in his
individual and official
capacity as Commissioner
of the Department of
Social Services; Robert
Kneece, Fred G. Scott,
Samuel Smith, Agnes Wilson,
Oscar P. Butler, Jr., John C.
Williams, Jr., and Lucy C. Trower,
individually and in their official
capacities as members of the State
Board of the Department of Social
Services; Collie L. Moore, W. H.
Neal, Catherine Morris, Allen Dowdy,
Arlene B. Andrews, Beatrice Sumter,
Robert E. Alexander, Melissa
Burnette, individually and in

their official capacities as members of the Richland County Board of the Department of Social Services; Mary Williams and Patricia Jones, individually and in their official capacities as Social Workers for the South Carolina Department of Social Services;
and
Barbara Locklair, individually and in her official capacity as a "Home Health Nurse" for the South Carolina Department of Social Services;

Appellees.

No. 83-1936

Karole K. Jensen, as Administratix of the Estate of Michael Clark, Deceased,

Appellant,

vs.

Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Mary D. Dusenberry, George D. Hamilton, Oscar P. Butler, Ph.D., John C. Williams, Jr., Lucy C. Thrower, Agnes Wilson, Ph.D., and W. Jerry Fedder, individually and in their official capacities as members of the State Board of the Department of Social Services; Jerry

Herd, Harold E. Simpson, Ophelia S. Smith; J. Furman Gerrard, and Odell Short, individually and in their official capacities as members of the Anderson County Board of the Department of Social Services,

Appellees,

and

Kenneth Pryor, individually and in his official capacity as Director of the Anderson County Department of Social Services;
Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services;
Susan Straup, individually and in her official capacity as Protective Services Supervices of the Anderson County Department of Social Services; and
Charie Ann Jenkins, in their official capacities as social workers with the Anderson County Department of Social Services,

Defendants.

Appeal from the United States District Courts for South Carolina, at Columbia and Anderson. Clyde H. Hamilton and William W. Wilkins, Jr., District

Judges. (C/A 82-2061 & 82-205-14)

Argued: March 5, 1984

Decided: October 5, 1984

Before WIDENER, MURNAGHAN and

ERVIN, Circuit Judges.

O. Fayrell Furr, Jr. (Charles L. Henshaw, Jr. on brief) for Appellant; Joel H. Smith (William C. Hubbard, Nelson, Mullins, Grier and Scarborough on brief) and James L. Werner (Wilburn Brewer, Jr., Nexsen, Pruet, Jacobs & Pollard; George Beighley, Richardson, Plowden, Grier & Howser; Charles E. Hill, Jr., Turner, Padgett, Graham & Laney; David Robinson, II, Robinson, McFadden, Moore, Pope, Williams, Taylor & Brailsford, on brief) for Appellees.

ERVIN, Circuit Judge:

Sylvia Brown, age seven months, and Michael Clark, age three years, died in the summer of 1979 after suffering brutal beatings at the hands of their guardians. Their estates, along with the estates of four other battered children, brought suit under 42 U.S.C. Section 1983 against the Commissioner of the South Carolina Department of Social Services, members of the State Board of the Department of Social Services, members of the board of the Richland and Anderson County Departments of Social Services, and various state employed case workers. The plaintiffs alleged that the State, acting through its employees, violated the children's fourteenth amendment rights by failing

to intervene and provide protection.

The Brown and Clark cases were heard by different district courts. In the Brown case the district court dismissed the suit for failure to state a claim upon which relief could be granted. The district court in the Clark case converted the defendants' motion to dismiss to summary judgment motions and ruled for the Commissioner and the board members. The Clark court, however, refused to grant summary judgment on behalf of the case workers. Under Fed. R. Civ. P. 54(b) the Clark court entered final judgment for the Commissioner and the board members and the two cases were consolidated for

appeal.[1]

The issue now before us on appeal is whether the defendants' failure to

---

[1]The Clark court's 54(b) certification did not purport to cover the caseworkers. The district court concluded that the evidence presented was insufficient to determine the caseworkers' involvement in the Clark investigation and that therefore the plaintiffs would be given additional time to continue discovery and file a more detailed complaint. Because a final judgment order had not been entered on the question of the caseworkers' liability at the time the suits were consolidated for appeal and notice of appeal was given, we believe that it would be improper to review the Clark court's denial of summary judgment to the caseworkers. The appeal by the caseworkers in Clark, therefore, is dismissed.

All of the Brown court's rulings, however, as well as the Clark court's rulings with respect to the Commissioner and the Board members, are properly before us on appeal under 28 U.S.C. Section 1291.

provide affirmative protection to the plaintiffs' decedents creates a cognizable Section 1983 claim. We conclude that at the time of the alleged violation a constitutional right of affirmative protection was not clearly established and that, therefore, good faith immunity was available to the defendants. Accordingly, we affirm the lower courts' ruling in the Brown case and affirm the grant of summary judgment in the Clark suit.

I.

A.

SYLVIA BROWN

The Plaintiff alleged that Sylvia Brown's plight first became known to Richland County social workers on

February 28, 1979, when the then four month old child was admitted to the Richland Memorial Hospital with a fractured skull. A C.A.T. scan revealed a "healing subdural hematoma." The attending physician immediately became concerned about the possibility of physical abuse by Sylvia's parents. This suspicion, the plaintiff contends, was confirmed after Mrs. Brown and her boyfriend visited Sylvia at the hospital. Hospital social workers received a report that during the visit Mrs. Brown's boyfriend held the child by the head and neck, and slapped the child in a rough manner.

The following week, a Richland Hospital social worker reported the case to the Richland County Department of Social Services and requested a child

protection investigation. After an initial review of the case, the Department of Social Services allegedly reached an agreement with Mrs. Brown requiring her to reside with Sylvia at the home of Sylvia's grandmother. Under the agreement, if Mrs. Brown returned home with her child, Sylvia would be placed in the custody of the Department of Social Services. In addition to this agreement, the Department also decided that an "intensive follow-up and in-home supervision" would be required.

According to the Plaintiff, over the course of the next two months the Department caseworkers failed to supervise adequately the family and carry out the recommendations of department officials and Sylvia's attending physician. The plaintiff

claims that Department caseworkers visited Mrs. Brown's house only twice, and on both of those occasions Sylvia was living alone with her mother. Despite the agreement, no action was taken.

On May 11, 1979, Sylvia was brought dead on arrival to the Richland Hospital. An autopsy revealed that brain hemorrhaging had occurred three times in the previous three weeks -- the last hemorrhage apparently took place only minutes before Sylvia died. After initially disclaiming responsibility,[2] Mrs. Brown pleaded guilty to involuntary manslaughter.

---

[2]When Sylvia arrived at the hospital, Mrs. Brown insisted that she had fallen out of bed. In her complaint, however, the plaintiff pointed out that Sylvia's bed was only two feet off the floor.

B.

Michael Clark

On February 28, 1980, the principal of New Prospect Elementary School informed the Anderson County Department of Social Services that the older brother of Michael Clark showed signs of child abuse. A caseworker from the Department immediately met with Michael's brother. The child was bruised about the face and told the caseworker that his father had hit him on several occasions. After conferring with teachers at the school, the caseworker concluded that a meeting with Mrs. Clark was necessary. Between March 6, 1980, and April 28, 1980, the caseworker and the Department attempted

repeatedly to contact Mrs. Clark. Letters and telephone calls went unanswered, and seven visits to various addresses failed to locate the Clark family. After sixty days the Department classified the case as "unfounded" and officially closed the investigation.

On June 23, 1980, Michael Clark was beaten to death by Mrs. Clark's boyfriend, Wayne Drawdy. Drawdy was subsequently tried and convicted for the child's murder.

C.

The South Carolina Child Protection Act, S. C. Code Ann. Section 20-7-480 et seq., requires state and county board members "to [establish] an effective reporting system and . . . an effective

system of service throughout the State to safeguard the well-being and development of endangered children . . . and save them from injury and harm." S. C. Code Ann. Section 20-7-480.[3] The

---

[3]S. C. Code Ann. Section 20-7-480 states in full that:

> Recognizing that abused and neglected children in South Carolina need protection, it is the purpose of this article to save them from injury and harm by establishing an effective reporting system and encouraging the reporting of children in need of protection; by establishing an effective system throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate; by establishing fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members and by establishing an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them.

statute charges the South Carolina State Department of Social Services with responsibility for coordinating child protection services throughout the state. Specifically, the department is required to 1) monitor and evaluate the child protection services provided by the counties and localities; 2) establish a central registry for child abuse reports; 3) coordinate referrals of child abuse cases; and 4) conduct training programs for local agency staffs. S. C. Code Ann. Section 20-7-640 (C), (D); Section 20-7-660 (A).[4]

---

[4]S. C. Code Ann. Section 20-7-640 (C) and (D) state in full that:

> (C) State Department of Social Services responsibilities shall include, but not be limited to: assigning and monitoring initial child protection responsibility

Under the statute the reporting system that the Department of Social Services must oversee consists of two

---

Footnote continued

through periodic review of services offered throughout the State; assisting in the diagnosis of child abuse and neglect; coordinating referrals of known or suspected child abuse and neglect; measuring the effectiveness of existing child protection programs and facilitating research, planning and program development; and establishing and monitoring a statewide central registry for child abuse and neglect as hereinafter provided.

(D) The County Department of Social Services in each county is designated as the Child Protective Service Agency, whose duties are set forth in Section 20-7-650. The county in which the child resides shall be the legal place of venue; provided, that in conjunction with the powers enumerated in this section, each County Board of Social Services shall appoint an advisory board to be composed of resident professionals in the

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

elements: county departments and local child protection agencies. The statute

---

Footnote continued

> county in which the child resides in the fields of medicine, including nurses, education, health, social workers, members of the clergy and law enforcement officials, if available for the purpose of determining the course of protective action to be taken by the County Department of Social Services. These recommendations are to be deemed advisory only. These appointments to the advisory board shall be made in a nondiscriminatory manner.

S. C. Code Ann. Section 20-7-660 (A) states in full that:

> (A) The Department of Social Services' Protective Services and the local child protective services agencies shall, on a continuing basis, inform all persons required to report under this article of the nature, problem and extent of child abuse and neglect and of their duties and responsibilities in accordance with this article. The Department of Social Services and local agencies shall also, on a continuing basis, conduct training programs for local agency staffs as well as appropriate training for persons required to report under this article.

mandates that the latter "be adequately staffed with persons trained in the investigation of suspected child abuse and neglect and in the provision of services to abused and neglected children and their families. S. C. Code Ann. Section 20-7-650 (B). The statute empowers the local agency to "petition the Family Court . . . to intervene" on behalf of the child should the agency deem it necessary, but the statute does not expressly require the agency to intervene. S. C. Code Ann. Section 20-7-650 (J)[5]

In both the Clark and Brown cases,

---

[5]S. C. Code Ann. Section 20-7-650 (J) states in full that:

> (J) If at any time after the initiation of protective services by the agency those receiving

the plaintiffs argued before the lower court that the statute created a "special relationship" between the state and victims of suspected child abuse by imposing an affirmative duty on the state government "to save [suspected victims] from harm." Relying primarily on our decision in Fox v. Custis, 712 F.2d 84 (4th Cir. 1983), the Clark and

---

Footnote continued

services indicate a refusal to cooperate, the agency shall withdraw. If the facts so warrant, the agency may petition the Family Court to invoke the jurisdiction of the court under the Family Court Act to intervene, but in no case shall the agency threaten such action to coerce participation.

Brown estates contended that this "special relationship" gave rise to a right under the fourteenth amendment to affirmative protection by the State.

In the Clark case, the district court agreed with the plaintiff that where "an individual [has been] legally entrusted to the care or protection of governmental officials," a failure to protect could constitute a deprivation of life without due process and thereby violate the fourteenth amendment. J. A. at 330-33. But the court concluded that because there was no "clearly established case law" defining the "general due process" requirements of the Child Protection Act and providing "reasonable notice of possible liability," the commissioners and the board members were entitled to good faith immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Accordingly, the court granted the Commissioners' and board members' motions for summary judgment.

In the Brown case, the district court concluded that the plaintiff had failed to allege a federal or constitutional claim upon which relief could be granted under 42 U.S.C. Section 1983. The fourteenth amendment, the court held, only created a right to affirmative protection by the state in those instances where legal custody or direct supervisory control of the victim lay in the hands of the state. Because the appellant's complaint never alleged that the state had assumed custody or direct supervisory control of Sylvia Brown under the Act, the court dismissed the suit as to all defendants.

On appeal, the appellants argue that the courts below erred in both

granting summary judgment for the Commissioner and the county and board members in Brown and in dismissing the suit in Clark. The appellants' contentions, we believe, hinge on two "threshold" issues: whether the fourteenth amendment affords the appellants a right to afirmative protection by the state, and if such a right presently exists, whether it was established clearly enough at the time the alleged deprivation occurred to avert the application of good faith immunity under Harlow.

II.

A.

Section 1983 of the Civil Rights Act only protects against action under color of state law that "subjects . . .

any citizen . . . or other person . . . to the deprivation of any rights . . . secured by the Constitution and laws" of the United States. Baker v. McCollan, 443 U.S. 137, 146-47 (1979); Paul v. Davis, 424 U.S. 693 (1976); Fox v. Custis, 712 F.2d 84, 87, (4th Cir. 1983). Thus, "the first inquiry in any Section 1983 suit . . . is whether the plaintiff has been deprived of [such] a right." Baker, 443 U.S. at 140. This inquiry, in turn, "involves 'isolating the particular constitutional infringement complained of'." Fox, 712 F.2d at 87, quoting Martinez v. California, 444 U.S. 277, 284 n.9 (1980).[6]

---

[6]Federal jurisdiction in this case arises under 42 U.S.C. Section 1983. Our inquiry, therefore, is limited solely to

In this case the appellants argue that the decedents possessed a constitutional right to protection by the government from harm inflicted by their parents or those acting as their parents. Specifically, the appellants assert that the State's failure to intervene effectively deprived Michael Clark and Sylvia Brown of liberty rights secured by the fourteenth amendment. As an initial matter, therefore, our inquiry must focus on the extent to which we can now assert that a right of affirmative protection exists. But our analysis must not stop there; we must

---

Footnote continued

determining whether the plaintiffs have alleged a vindicable federal or constitutional right. A state cause of action, based either on statute or on common law, may be available to the plaintiffs, see part III infra, but that is not the issue before us.

also determine the precise time at which such a right -- if it presently exists -- can be said to have emerged. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). For this a careful review of recent case law is required.

The most relevant line of cases dates from 1976. The alleged violations occurred in 1979. Thus our examination of the case law must be aimed at determining the extent to which a clearly defined right had emerged from this shifting line of cases as of 1979.

i

The current debate over affirmative duty and constitutional tort stems in large part from a prisoner petition case decided by the Supreme Court in 1976. In Estelle v. Gamble, 429 U.S. 97 (1976), an inmate of the Texas Department of

Corrections sued prison officials for failing to provide adequate medical treatment for a back injury suffered while performing a prison work assignment. The prisoner's claim was brought under Section 1983, and alleged that prison officials had subjected him to cruel and unusual punishment in violation of the eighth amendment. The Court held that although the record failed to support the prisoner's claims, prison officials could not act with "deliberate indifference" to the medical needs of prisoners without violating the eighth amendment:

> We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 182-183, 49 L Ed 2d 859, 96 S Ct 2909 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to

> the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under Section 1983.

429 U. S. at 104-05. The Court reasoned that because the prisoner was unable "'by reason of the deprivation of his liberty, to care for himself'", it was only "just" that "'the public'" be required to care for him. Id. at 103-04, quoting Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926). In the Court's view, therefore, the government had an "obligation to provide medical care for those whom it is punishing by incarceration." Estelle, 429 U.S. at 103.

We followed Estelle in several similar eighth amendment Section 1983

prisoner cases. See Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979); Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980). In all of these cases, we limited the imposition of an affirmative duty of care on the government to prison settings where eighth amendment concerns were involved and state employees had acted with "deliberate indifference."

Thus, as of 1980, affirmative duty and constitutional rights had found a common ground in this circuit only in the prison setting. The government's duty to protect applied only to those incarcerated by the state, for only those individuals could be subjected to an eighth amendment violation. A look at the cases that quickly followed Estelle -- cases which expanded the

right to affirmative protection -- underscores by comparison just how narrow the right was in 1980. It is to those cases that we now turn.

ii

The first major post-Estelle decision was decided by the Supreme Court in 1980. In Martinez v. California, 444 U.S. 277 (1980), the Court was asked to address the question of whether the government had an affirmative duty under the fourteenth amendment to protect a private citizen from the actions of a parolee. Martinez, a fifteen year old girl, had been murdered by a "mentally disturbed sex offender" who had been sentenced to one to twenty years, but paroled after five. The State of California conceded

that the parolee was a known risk when he was let out. Legally, the attacker was still in the custody of the state when he killed Martinez.

The Court ruled that Martinez had failed to allege a cognizable claim under Section 1983. Yet rather than addressing directly the issue of whether Martinez had a constitutional right to protection under the fourteenth amendment, the Court chose to decide the case on the narrow grounds that Martinez had failed to establish proximate cause. The parolee, the Court pointed out, was not "an agent of the parole board," id. at 285, and the murder had occurred five months after the parolee's release. Id. Under these circumstances, the Court concluded, the causal connection between the action of the

parolee and that of the State was too attenuated to hold the government liable.[7]

But in the final paragraph, the Court clearly left open the possibility that in another setting the fourteenth amendment right asserted by Martinez might be upheld in a Section 1983 suit:

> We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. But we hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.

Id. at 285.

---

[7] Cf. Rizzo v. Goode, 423 U.S. 362 (1976) (police department's failure to act in face of statistical pattern of police abuse does not give rise to fourteenth amendment violation because no showing of "direct responsibility" by the department for the incidents).

In 1981 the Second Circuit attempted to resolve the question left open by Martinez. In Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) two young girls filed suit against the State of New York after they were beaten and sexually abused by their foster father. The girls, who were technically in the custody of the New York City Commissioner of Welfare, alleged that the State had violated an affirmative duty of protection -- guaranteed under the fourteenth amendment -- when it failed to inspect and recertify the foster home to which the claimants had been assigned.

Without expressly mentioning the fourteenth amendment, the court held that the State could violate a "constitutionally protected liberty or

property interest" by failing to protect an individual who had been placed in the government's "custody or care." Id. at 141.[8] In its discussion the court cited Estelle v. Gamble and other eighth amendment prisoner cases. Id. This citation was significant, for it marked the first time that the eighth amendment analysis had been applied to a traditional fourteenth amendment claim involving liberty and property interests.

---

[8]Although the court concluded that a right existed, it ultimately ruled for the defendants because the plaintiffs had failed to establish that the state had acted with "deliberate indifference." Doe, 649 F.2d at 141. The Doe court's discussion of deliberate indifference need not concern us here, for that issue only becomes relevant if there has been a determination that a right exists in the first instance.

One year later, in 1982, the Seventh circuit also addressed the issue left open in Martinez. Although the court ultimately ruled against the Plaintiff, [9] it significantly expanded the reasoning in Doe. In Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982), a schizophrenic, with a history of criminal violence murdered Marguerite Bowers one year after being released from an Indiana State Mental Hospital. Bowers' estate filed a Section 1983 suit against the hospital, claiming that the State had reason to know that the former patient was dangerous and thus had acted recklessly in permitting his discharge.

The court disagreed. Expressly refusing to distinguish the case from

---

[9] See infra note 10.

Martinez, the Court ruled that "there is no constitutional right to be protected by the State against being murdered by criminals or madmen." In the Seventh Circuit's view, the Constitution was designed as "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." Id. at 618.

The court, however, was careful to limit its holding to situations where the state had not taken an active role in placing an individual in a position of danger:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state

> puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. It was here, the court reasoned, that a fourteenth amendment claim based on an affirmative duty overlapped with the affirmative duty recognized by the Supreme Court in eighth amendment prisoner cases:

> It is on this theory that state prison personnel are sometimes held liable under Section 1983 for the violence of one prison inmate against another.

Id. Significantly, the court did not draw a distinction between "custodial" and "other" relationships. In this sense, Bowers moved one step beyond Doe. Rather than implicitly limiting governmental liberty to custodial

relationships the Bowers court chose to speak in broader terms; in the court's view, it was not the precise type of relationship that mattered, but whether the government had placed an individual in danger.[10]

The analytical approach of Bowers was closely followed by this court one year later in Fox v. Custis, 712 F.2d 86 (4th Cir. 1983). The facts of Fox were similar to Martinez. Fox, a young woman, suffered injuries when a Virginia parolee set fire to her house. The parolee had been convicted previously of arson and grand larceny and sentenced to

---

[10]Ultimately the court ruled against Bowers because she had failed to show that the state had placed her in a position of danger. 686 F.2d at 618-19.

twenty years. After two years, he was paroled. Despite several violations, the parolee was permitted to remain on parole. It was at this point that the Fox arson occurred.

We approached the question of affirmative duty in two ways. First, as in Martinez, we concluded that the injuries were "'too remote' from the challenged conduct of the State to constitute a 'deprivation' of constitutional rights under Section 1983." Id. at 887. But convinced that the "mix of factors" made this a less persuasive case than Martinez to decide on proximate cause grounds, we concluded that it was also necessary to examine whether the appellant had asserted a cognizable constitutional claim under the fourteenth amendment. Citing Bowers, we held that a duty could arise

out of a special "custodial or other relationships":

> With one qualification, we agree with the Seventh Circuit's recent holding that, in general, there simply is "no constitutional right to be protected by the state against . . . criminals or madmen," and that because in corollary, there is no "constitutional duty [on the state] to provide such protection, its failure to do so is not actionable under section 1983." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). The qualification -- an important one actually acknowledged by the Bowers court, id. -- is that such a right and corollary duty may arise out of special custodial or other relationships created or assumed by the state in respect of particular persons. For example -- as we have held in this circuit -- such a right/duty relationship may arise under Section 1983 with respect to inmates in the state's prisons or patients in its mental institutions whom the state knows to be under specific risk of harm from themselves or others in the state's custody or subject to its effective control. Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980) (prison inmates under known risk of harm from homosexual assaults by other inmates); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (inmate under observed attack by another inmate); Woodhous v. Virginia, 487

F.2d 889 (4th Cir. 1973) (same as Withers); cf. Orpiano v. Johnson, 632 F.2d 1096, 1101-03 (4th Cir. 1980), cert. denied, 450 U.S. 929, 101 S.Ct. 1387, 67 L.Ed.2d 361 (1981) (no right where no pervasive risk of harm and specific risk unknown); see also Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Gann v. Delaware State Hospital, 543 F. Supp. 268, 272 (D.Del. 1982); Walker v. Rowe, 535 F. Supp. 55 (N.D. Ill. 1982) (duty of state to protect guards).

Id. at 88.

Our ruling, however, did not simply rehash Bowers. In two important respects Fox expanded on precedent. First, Fox completed the convergence of eighth and fourteenth amendment analysis that had begun in Doe and took shape in Bowers. The constitutional right that we asserted could arise was clearly based on the fourteenth amendment, but the shape and definition that we gave to that right by using the term "custodial or other relationship" was influenced in large part by the considerations that

lay behind the eighth amendment cases. Recognizing that the fourteenth amendment could not be read to establish a general affirmative duty to the public at large, we chose to limit that duty by applying a rationale similar to that used in Estelle: namely, that where the state had selected an individual from the public at large and placed him in a position of danger, the state was enough of an "active tortfeasor" to make it only "just" that the state be charged with an affirmative duty of protection. Bowers and Doe also made use of the eighth amendment analysis to address the fourteenth amendment issue, but Fox acknowledged more candidly and expressly than either Doe or Bowers the concerns that had helped to shape the contours of the duty imposed on the government.

Second, the Fox ruling was important because it stated in terms more explicit than Bowers that a right to affirmative protection need not be limited by a determination that there was a "custodial relationship." The Fox court ruled that a right to protection could arise from a custodial or other relationship.

Fox's estate, however, failed to claim that a special relationship existed between her and the State. For this reason we found it unnecessary to define the type of "special relationship required to give rise to a right . . . to affirmative protection. . . ." 712 F.2d at 88. In one sense, then, Fox represented the culmination of a line of analysis that had begun in Martinez, for it firmly established that a right of

affirmative protection could arise under the fourteenth amendment. But at the same time Fox left the inquiry nearly as open-ended as Martinez, for it did not purport to delimit the scope of the right.

Having established that a right of protection may, given the proper facts, exist at present, the question now becomes whether that right was properly invoked by the plaintiffs in the cases at hand.

B.

Under Harlow v. Fitzgerald, 457 U.S. 800 (1982), governmental officials will not be held liable if the law at the time of the alleged wrongdoing was not "clearly established." Id. at 818.

Sylvia Brown and Michael Clark died in the spring of 1979. As our discussic in Part II A above makes clear, an affirmative duty of protection under the fourteenth amendent did not emerge until after 1980. Indeed, the comparison of the post-1980 Martinez-Fox line of cases with Estelle and its pre-1980 eighth amendment progeny demonstrates just how limited the right to affirmative protection was in this circuit at the time the alleged violations occurred. Although the seeds of a fourteenth amendment-based right lay dormant in the eighth amendment cases, the defendants could not have anticipated the expansion that would later occur.

Moreover, even were we to rule that the defendants could have foreseen the Fox holding, it is not clear that under

the facts of this case the defendants could, or should, have foreseen that a "special relationship" existed. Given the absence of specific guidelines to determine precisely what constitutes a "special relationship" and the particularly "close" nature of the factual cases before us, we would be hardpressed to conclude that the law as it affected the defendants was "clearly established."[11] We conclude, therefore,

---

[11] Although we find no need to provide a comprehensive definition of "special relationship" given the facts of these cases, we note that these cases underscore some of the factors that should be included in a "special relationship" analysis. These factors -- which would make these cases particularly close ones were we to decide them -- include:

1. Whether the victim or the perpetrator was in legal custody at the time of the incident, or had been in legal custody prior to the incident.

that we need not decide whether, under the circumstances of this case, the State had created or assumed a "special

---

Footnote continued

Here, for example, as in Fox and Martinez and unlike the situations in Withers and Woodhous, the claimants were members of the general public and not in custody. The state defendants were unaware that they, as opposed to anyone else in the public at large, faced a special danger. This fact, combined with the lack of a past or present custodial relationship between the state and the perpetrators, would argue against finding that a special relationship existed.

2. Whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals.

   This factor does not really argue convincingly one way or the other in our cases. It is difficult to conclude that the State intended to "single out" the decedents and

relationship" with the Clark and Brown families. All of the defendants were entitled to a good faith immunity

---

Footnote continued

place them in its own care as in the eighth amendment cases that Fox relies on so heavily. On the other hand, the preamble of the Child Proteciton Act does clearly express a desire to take affirmative steps to locate and protect potentially abused children.

3. Whether the State knew of the claimants' plight.

This factor goes more to the breach of the "special relationship" than a definition of the relationship. Yet it may prove probative of the extent to which the State intended to protect or watch over the particular claimant involved. In this case there is some indication that the State knew the children were being beaten. This strengthens the argument that some sort of special relationship had been established.

defense against liability under Section 1983.[12] The district court should have

---

[12]The appellants argue that good faith immunity is not applicable because the affirmative duty owed by the State was "clearly established" in the Child Protection Act at the time the alleged wrongdoing occurred. This argument simply misses the mark. The law in this instance that must be "clearly established" to avert the application of Harlow is a constitutional right to protection by the State. A state statute, by itself, cannot create a substantive constitutional right. Maine v. Thiboutot, 448 U.S. 1 (1980). Once an affirmative duty has been found to exist under the fourteenth amendment, it may then be possible for a State statute to trigger the application of that right. But if the underlying substantive right has not yet been clearly established, good faith immunity may be invoked regardless of the language of the statute.

Moreover, it is not even clear that the Child Protection Act requires the type of affirmative protection that the claimants argue that it does. The Act does not create an expess duty of intervention but rather provides only that the State "may" intervene. See discussion supra at 10.

dismissed both complaints along with the pendent claims at the summary judgment stage.[13]

---

[13]Judge Wilkins did not act improperly in dismissing the case at the summary judgment stage with respect to those defendants for whom he found qualified immunity was applicable. In Harlow the Supreme Court eliminated the subjective good faith standard that had been used to determine if qualified immunity should be applied to executive officials and substituted an "objective reasonableness" test. The court reasoned that if the law was not clearly established, immunity should be applied at the pretrial stage so as to minimize disruption of government activities. The court stated that:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge may determine, not only the currently applicable law, but whether that law was clearly established at the

We emphasize, however, that our decision today does not mean that a good faith immunity defense will always be available for defendants sued for failing to provide affirmative protection based on a Fox analysis. We hold only that under the facts of this case neither the state and county board members nor the caseworkers could reasonably have been expected to know

---

Footnote continued

> time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.

457 U.S. at 818.)

that a failure to protect Sylvia Brown and Michael Clark potentially constituted a violation of their fourteenth amendment rights. Because our decision is based upon our belief that the Fox decision could not have been anticipated by the defendants, we need not attempt a definition of the type of relationship required to give rise to a right of protection under Fox. Were the issue properly before this court on different facts, there would be nothing to preclude further definition of the meaning of that term followed by a ruling that the facts of that case fell within the meaning of "special relationship".

III.

Although our decision today leaves

the appellants without a remedy in federal court, the victims's estates still have several causes of action available to them in state court. We express no view on the appellants' rights under the tort law of South Carolina, but as the Seventh Circuit pointed out in Bowers, "[t]he tendency in the common law has been to impose ever greater liability on officials who negligently fail to protect the public from dangerous criminals and lunatics." Bowers, 666 F.2d at 618.[14]

---

[14] See, e.g., Homere v. State, 48 App. Div.2d 422, 370 N.Y.S.2d 246 (1975); Leverett v. State, 61 Ohio App. 2d 35, 40-41, 399 N.E.2d 106, 109-10 (1978); Williams v. United States, 450 F. Supp. 1040, 1044-45 (D.S.D. 1978).

IV.

For the foregoing reasons, the judgment of the District Court for the District of South Carolina at Columbia is affirmed, and the judgment of the District Court for the District of South Carolina at Greenville is affirmed in part and dismissed in part.

AFFIRMED IN PART; DISMISSED IN PART.

MURNAGHAN, Circuit Judge, concurring:

Sometimes I yield to an impulse to embellish an opinion in a way not strictly necessary. The notion may exist that I can clarify or improve the law, even though the issue I endeavor to address is not truly presented by the case. As time goes by, however, I am coming more and more to an appreciation that, however silver the speech, silence is usually constructed from 24 karat gold.

So, with deference, and despite the freshly minted pure silver from which the majority opinion has been cast, I disassociate myself from everything appearing in the opinion endeavoring to establish the existence of a special relationship between the brutalized

children on the one hand and the South Carolina Department of Social Services and its case workers on the other. Were the question before us, we should have to investigate whether the "special relationship" due process contention could hold water in the absence of the South Carolina legislation. Parental control of the destiny of a child may, in general, constitute so important a right that the Supreme Court might determine that a constitutional duty simply is not imposed on any state or local government employee who learns of suspected abuse to take steps to insure that a child apparently brutalized is removed from parental custody or otherwise guarded against violence from the parents.

Second, assuming that, absent

statute, no right exists under the Fourteenth Amendment, we should, nevertheless, have further to decide whether the South Carolina statute brings about a constitutional right of affirmative protection. Neither of those two questions is easy of resolution. The cases supporting the majority's conclusion that there is a right (though admittedly rendered inapplicable here because of the existence of a good faith immunity defense) generally partake of the characteristic called "dicta". They are ones which asume there is a right, but find it not applicable or not violated on the facts of the cases themselves.

Accordingly, prudence dictates to me that I limit my participation in the majority opinion to concurrence in the

proposition which all panel members accept: namely, that, whether or not a constitutional right to affirmative protection exists, it manifestly was not established clearly enough to permit recovery at the time that the alleged deprivations occurred. My concurrence consequently rests solely on the uncontrovertible existence in each of the cases of good faith immunity as a defense against liability under 42 U.S.C. Section 1983.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Karole K. Jensen, as Administratrix of the Estate of Sylvia R. Brown, Deceased, Plaintiff, vs. Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Robert Kneece, Fred G. Scott, Samuel Smith, Agnes Wilson, Oscar P. Butler, Jr., John C. Williams, Jr., and Lucy C. Trower, individually and in their official capacities as members of the State Board of the Department of Social Services; Collie L. Moore, W. H. Neal, Catherine Morris, Allen Dowdy, Arlene	CIVIL ACTION NO. 82-2061-15 ORDER

B. Andrews, Beatrice)
Sumter, Robert E.)
Alexander, Melissa)
Burnette, individ-)
ually and in their)
official capacities)
as members of the)
Richland County)
Board of the Depart-)
ment of Social)
Services; Mary)
Williams and)
Patricia Jones,)
individually and in)
their official capa-)
cities as Social)
Workers for the)
South Carolina)
Department of Social)
Services; and)
Barbara Locklair,)
individually and in)
her official)
capacity as a "Home)
Health Nurse"for the)
South Carolina)
Department of)
Social Services,)
Defendants.)
_____)

This matter comes before the court upon three motions to dismiss for failure to state a claim upon which relief may be granted, filed by the defendants pursuant to Rule 12(b)(6) of

the Federal Rules of Civil Procedure. The first motion was filed on November 15, 1982, by defendants Conrad, Kneece, Wilson, Butler and Williams, the Commissioner of the South Carolina Department of Social Services (hereinafter "Commissioner") and the members of the State Board of the Department of Social Services (hereinafter "State Board"), respectively. All defendants were sued both in their individual and official capacities. This motion was later joined by three other members of the State Board, Ms. Lucy C. Trower (January 11, 1983), Mr. Samuel Smith (February 23, 1983) and Mr. Fred G. Scott (March 2, 1983). The cause behind their delay in joining the motion to dismiss was attributed to delay in service of process.

The second motion to dismiss was filed on November 16, 1982, by the defendants, Moore, Neal, Morris, Andrews, Sumter, Alexander and Burnette, members of the Richland County Board of the Department of Social Services (hereinafter "County Board") who were also sued by the plaintiff in their individual and official capacities. This motion was later joined by defendant board member Allen Dowdy on January 10, 1983.

The third motion to dismiss was filed by the defendant Barbara Locklair in her individual and official capacity, on January 13, 1983. At oral argument on the motions to dismiss, held February 25, 1983, the court was advised that Ms. Locklair is employed by the South Carolina Department of Health and Environmental Control as a home health

nurse.

In analyzing the motions to dismiss, the court will first assess the viability of the plaintiff's complaint as asserted against the Commissioner and Barbara Locklair in their official capacities and against the State Board members in their official capacities. Next the court will address the motion to dismiss filed by the members of Richland County Board in their official capacities. Finally, the court will turn to an analysis of all three motions to dismiss asserted by defendants in their individual capacities.

COMMISSIONER, STATE BOARD AND BARBARA LOCKLAIR OFFICIAL CAPACITIES

Karole K. Jensen, as Administratrix of the Estate of Sylvia R. Brown, a

deceased minor, brings this action against (1) the Commissioner of the South Carolina Department of Social Services (2) members of the State Board of the South Carolina Department of Social Services (3) members of the Richland County Board of the Department of Social Services (4) two social workers employed by the South Carolina Department of Social Services and (5) Mrs. Barbara Locklair, a home health nurse employed by the South Carolina Department of Health and Environmental Control. Ms. Jensen brings this action pursuant to 42 U.S.C. Sections 1983 and 1988. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the U. S. or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

> by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper porceeding for redress.

In this action, Ms. Jensen alleges that these defendants deprived her decedent, Sylvia Brown, of her Fourteenth Amendment right to life by their failure to protect her from the physical abuse inflicted upon her by her parent(s), such abuse being the ultimate cause of her death on May 11, 1979. The complaint also asserts a pendent state claim brought pursuant to the South Carolina Wrongful Death Act, Sections 15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended, for the benefit of the statutory beneficiaries of the deceased. Plaintiff seeks actual and punitive damages, an award of reasonable attorneys fees and costs, and such other

relief as this court would deem just and proper.

At the motions hearing held on February 25, 1983, the court raised, sua sponte, and does now address, the question of the applicability of the Eleventh Amendment of the United States Constitution to the suit against the Commissioner, the State Board and Barbara Locklair in their official capacities. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Although, by its terms, the Amendment does not preclude suits against a state by its own citizens, the Supreme Court has held that a state is

immune from suits brought in federal courts by its own citizens as well as by citizens of another state or citizens or subjects of any foreign state. Edelman v Jordan, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L.Ed2d 662 (1974), citing Hans v. Louisiana, 134 U.S. 1 (1890); Duhne v. New Jersey, 251 U.S. 311 (1920); Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944); Parden v. Terminal R. Co., 377 U. S. 184 (1964); and Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973). Moreover, it is well settled that the Eleventh Amendment bars a suit against a state agency, entity or institution, such as the Department of Social Services and its governing body, the State Board, which functions as an arm or alter ego of the state. Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057,

57 L.Ed.2d 1114 (1978). That this suit is brought against the Commissioner, Barbara Locklair, and the members of the State Board "individually and in their official capacity" does not alter the fact that it is brought against the Department of Social Services and the Department of Health and Environmental Control, with respect to Ms. Locklair. As set forth by the Third Circuit in Laskaris v. Thornburgh, 661 F.2d 23 (1981):

> [A]n action in federal court for damages or back pay against a state official acting in his official capacity is barred [by the Eleventh Amendment] because such retrospective relief necessarily depletes the state treasury. Id. at 26.

Also, as set forth by the Fourth Circuit in the 1982 case of Hughes v. Blankenship, 672 F.2d 403 (4th Cir. 1982):

> Official capacity suits represent but another way of pleading an action against the entity of which the officer is an agent, Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), and damages may be awarded against a defendant in his official capacity only if they would be recoverable against the governmental entity itself. Monell, supra; Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980).

Similarly, the supreme Court in Edelman v. Jordan, supra, stated, "It is also well established that even though a state is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." Edelman at 94 S. Ct. 1355.

Therefore, the rule has evolved that a suit seeking to impose a liability which must be paid from public (state) funds is barred by the Eleventh Amendment. Edelman at 94 S. Ct. 1356. In the instant suit, any recovery by the

plaintiff against the Commissioner, Barbara Locklair and the State Board members in their official capacities would require payment from public funds which is impermissible under the Eleventh Amendment. Belcher v. South Carolina Board of Corrections, 460 F. Supp. 805 (1978). Therefore, the court is of the opinion, based on Laskaris, supra, Edelman, supra, and Hughes, supra, that a suit against members of the State Board of the Department of Social Services in their official capacities and against Barbara Locklair and the Commissioner in their official capacities which seeks damages is a suit aginst the state of South Carolina for purposes of Eleventh Amendment analysis.

The immunity afforded the states by the Eleventh Amendment can be overcome

if the state waives its constitutional immunity and consents to suit or, with respect to the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution if Congress abrogates the state's immunity pursuant to its authority to enforce the substantive provisions of those amendments "by appropriate legislation." Amendment XIII, Section 2; Amendment XIV, Section 5; Amendment XV, Section 2. The doctrine of sovereign immunity prevails in South Carolina. Belue v. City of Spartanburg, 276 S. C. 381, 280 S.E.2d 49 (1981). Clearly, the state has not waived its immunity regarding claims such as those asserted by the plaintiffs herein. Additionally, Congress did not exercise its power to abrogate the state's Eleventh Amendment immunity in enacting 42 U.S.C. Section

1983. Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L.Ed 2d 358 (1979); Sessions v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981) and Gourdine v. Ellis, 435 F. Supp. 882 (D.S.C. 1977). In summary, absent consent to suit or federal legislation abrogating its Constitutional immunity, neither the state nor its alter egos, the State Board, the Commissioner and Barbara Locklair, sued in their official capacities, are subject to suit under 42 U.S.C. Section 1983. (emphasis added).

COUNTY BOARD MEMBERS
OFFICIAL CAPACITIES

As stated previously, a suit against a public official in his official capacity is treated as a suit against the entity, therefore this suit against the Richland County Board of the

Department of Social Services is for all purposes a suit against Richland County.[1] Huges v. Blankenship, supra;

[1]During oral argument the question arose as to whether the Richland County Board of the Department of Social Services was but the alter ego of the South Carolina Department of Social Services and thereby entitled to immunity from suit in this court under the Eleventh Amendment principles discussed earlier. There is no information in the record as to the relationship between this board and the state agency for purposes of Eleventh Amendment analysis. As set forth by the Supreme Court in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 572, 50 L.Ed.2d 471 (1977), the relevant isssue is whether the County Board is "to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or . . . as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." See also, Holley v. Lavine, 605 F.2d 638 (1979). In view of the inadequacy of the record at this time, the court reserves for later decision the question of the applicability of Eleventh Amendment immunity to the County Board.

Laskaris v. Thornburgh, supra and Universal Amusement Co. v. Hofheinz, 646 F.2d 996 (5th Cir. 1981). In Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L.Ed. 2d 611 (1978), the Supreme Court held that a local government may be liable under Section 1983 for an injury caused by a "policy or custom . . . made by its lawmakers or . . . those whose edicts or acts may fairly be said to represent official policy . . . ." These constitutional deprivations may be "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." 436 U.S. at 691, 98 S. Ct.

at 2036. Additionally, the Fourth Circuit has held in the 1981 case of Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) that official policy may be established by the omissions of supervisory officials as well as from their affirmative acts. In Avery, the plaintiff alleged that the county, its board of health and its board of social services, and several individuals wrongfully caused her sterilization after informing her that she had sickle cell trait. The Fourth Circuit, in reversing the district court's grant of summary judgment in favor of the county and its boards asserted:

> [T]he conduct of the boards may be actionable if their failure to promulgate policies and regulations rose to the level of deliberate indifference to Avery's right of procreation or constituted tacit authorization of her sterilzation. (emphasis added) [cites omitted] Id. at 114.

In view of the Fourth Circuit's pronouncement in Avery and the Second Circuit's decision of Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), discussed infra, the court is of the opinion that the plaintiff's complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim as against the County Board members sued in their official capacities. Under the test applicable to a motion to dismiss as set forth by the Supreme Court in Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957), this court cannot now hold that, "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief."

Therefore, plaintiff's cause of

action pursuant to 42 U.S.C. Section 1983 and 1988 asserted against the County Board members in their official capacities stands. However, the court does hold, in accordance with the Supreme Court's ruling in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L.Ed. 2d 616 (1981) that the Plaintiff, Ms. Jensen, would not be entitled to recover punitive damages against the County Board members in their official capacities should she be successful on the underlying action brought pursuant to 42 U.S.C. Section 1983.

Although not addressed by counsel for the County Board, the court is constrained to raise sua sponte the viability of the plaintiff's claim against that entity under the South Carolina Wrongful Death Act, Sections

15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended. As set forth in 5 C. Wright and A. Miller, Federal Practice and Procedure Section 1357 (1973): "Even if a party does not make a formal motion, the court on its own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim."

As noted previously, the doctrine of sovereign immunity prevails in the state of South Carolina. Belue v. City of Spartanburg, 276 S.C. 381, 280 S.E. 2d 49 (1981). Neither the state nor any of its political subdivisions can be held liable in an action ex delicto unless by express enactment of the General Assembly. Graham v. Charleston County School Board, 262 S. C. 314, 204 S.E.2d 384 (1974). Since there has been

no enactment of the General Assembly authorizing an action for wrongful death against a County Board of the Department of Social Services, plaintiff's pendent claim against that entity under the South Carolina Wrongful Death Act should be dismissed. See also, Belton v. Richland Memorial Hospital, 263 S.C. 446, 211 S.E.2d 241 (1975) and Chilton v. City of Columbia, 247 S.C. 407, 147 S.E.2d 642 (1966).

ALL DEFENDANTS

INDIVIDUAL CAPACITIES

Turning now to defendants' motions to dismiss as applied to their individual capacities, the court notes that the defendants largely, and correctly, rely on the doctrine of

qualified immunity from suit available to public officials under the recent United States Supreme Court decision of Harlow v. Fitzgerald, ____ U.S. ____, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982).[2]

In Harlow, the Supreme Court held:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Citing Procunier v. Navarette, 434 U.S. 555, 565, 98 S. Ct. 855, 861, 55 L.Ed.2d 24 (1978); Wood v. Strickland, 420 U.S. 308, 321, 95 S. Ct. 992, 1000, 43 L.Ed.2d 214 (1975). Id. at 102 S. Ct. 2738.

[2]It is perhaps important to make clear at the outset of this section that qualified immunity insulates public officials only from liability in their individual capacities. Hughes v. Blankenship, 672 F.2d 403 (1982). It is not available to a governmental official sued in his official capacity since that is treated as a suit against the entity. Universal Amusement Co. v. Hofheinz, 646 F.2d 996 (5th Cir. 1981).

Prior to Harlow, good faith immunity was available to public officials sued in their individual capacities in actions for damages unless (1) the official knew or reasonably should have known that the action he took within the sphere of his official responsibilities would violate the constitutional rights of the plaintiff or (2) he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975). The two prongs of this analysis were referred to as the "objective" and "subjective" elements, respectively. The Supreme Court in Harlow rejected the second exception to good faith immunity, the "subjective" element , noting that, "[t]he subjective element of the good

faith defense frequently has proved incompatible with our admonition in Butz [Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978)] that insubstantial claims should not proceed to trial." Harlow 102 S.Ct. at 2737.

Therefore, the court must proceed to analyze the availability of qualified immunity to the defendants under the "objective element" analysis set forth in Wood and clarified in Harlow. First, however, the court would like to address two points: The first is that the decision in Harlow, which involved a suit against a federal government official under the Constitution,, is equally applicable to suits against state officials sued in their individual capacities for constitutional violations under Section 1983. As set forth in footnote 30 of Harlow:

> This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under Section 1983. We have found previously, however, that it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials. (emphasis added). Butz v. Economou, 438 U.S., at 504. 98 S. Ct., at 2909.

Additionally, the Fourth Circuit, in the case of Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982), has proceeded to determine the availability of qualified immunity under the Harlow analysis to a state prison official sued under Section 1983. In Ward, the chairman of the prison adjustment committee was sued for an alleged violation of an inmate's constitutional right in the course of a disciplinary hearing. Although the en banc court

found that the chairman was entitled to absolute immunity, it also noted the following in a well-reasoned opinion by Judge Russell:

> Though we are convinced and so hold that the defendant Gardner under the facts of this case was entitled to absolute immunity from an award of damages in favor of the plaintiff, we would perhaps be remiss not to take note of the possibility that the defendant Gardner may have been likewise qualifiedly immune from damages liability. Id. at 1110.

Judge Russell then analyzed the availability of qualified immunity under the "objective element" test of Harlow, Butz, and Wood. The Court also notes that the Sixth Circuit, at the direction of the Supreme Court, has applied Harlow qualified immunity analysis to Ohio parole officers in a suit under Section 1983. Wolfel v. Sanborn, 691 F.2d 270 (1982).

The second point that the court would like to address concerns the availability of the defense of qualified immunity on a motion to dismiss. As set forth in the Fourth Circuit in Ward:

> Finally, it [the Supreme Court] concluded that it was appropriate for the judge (emphasis added) to 'determine, not only the currently applicable law, [and] whether that law was clearly established at the time an action occurred' and that, if the court determined that it was not 'clearly established' at that time, a grant of summary judgment, based on the officials qualified immunity right, was in order. quoting Harlow. Id, at 1111.

A motion for summary judgment and a motion to dismiss for failure to state a claim are, of course, very closely related, as the final sentence of Federal Rule of Civil Procedure 12(b) makes clear. Therefore, this court is convinced that the "threshold immunity question" is appropriate on a motion to dismiss. As the Fourth Circuit noted in

its analysis of Harlow: "It [the Supreme Court] proceeded to declare that '[u]ntil this threshold immunity question is resolved, discovery [or further proceedings in this case] should not be allowed.'" Ward at 1111.

Turning now to an analysis of the "objective element" of qualified immunity as it applies to the defendants sued in their individual capacities, the threshold question to be answered is whether the constitutional right which the plaintiff claims was violated by the defendants was "clearly established" at the time of the alleged violation. (emphasis added).

The Harlow standard is the objective element of qualified immunity announced in Wood v. Strickland, supra. Therefore, in attempting to determine whether a federal right is considered

"clearly established," reliable guidance can be drawn from the lower court decisions that have interpreted the objective test found in Wood. Smith, Qualified Immunity from Liability for Violations of Federal Rights - A Modification, The Institute of Government - Chapel Hill, N. C. (January, 1983).

The Plaintiff in the instant case contends that:

> Defendant clearly knew or should have known that not only was the Plaintiff's decedent entitled to his Fourteenth Amendment right to life but furthermore, Defendants knew or should have known that under the laws or customs of the State of South Carolina, more particularly by S. C. Code Section 20-7-640, et seq, (recodified in 1981), they were charged with an affirmative duty to investigate, care for, and protect the welfare of the Plaintiff's decedent. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at page 7.

However, an official's knowledge of

a general constitutional provision, such as the Fourteenth Amendment, does not always tell him whether proposed action or inaction would violate that general constitutional provision. The defense of qualified immunity depends instead on an analysis of whether the courts have decided that a particular right is included within the protection of a general constitutional provision. (emphasis added). Smith, supra. This important distinction was explored in the Supreme Court case of Procunier v. Navarette, 434 U.S. 555, 98 S. Ct. 855, 55 L.Ed. 2d 24 (1978) and also noted in the lower court decisions of Sullivan v. Meade Independent School District, 530 F.2d 799 (8th Cir. 1976) and Tate v. Alexander, 527 F. Supp. 796 (M.D. Tenn. 1981).

Therefore, in the instant case, the

question is not whether the defendants knew or should have known of the general Fourteenth Amendment prohibition against the deprivation of life without due process of law. The question is whether the law at the time of the incident complained of "clearly established" that their failure to promulgate and implement training programs for social workers dealing with abusive parents or their failure to adequately supervise the workers rendered them liable to a child subsequently killed by its parents for the deprivation of its Fourteenth Amendment right ot life.

Whether or not a federal constitutional right is "clearly established" at the time of the alleged wrongful acts depends on a review of the opinions of the Supreme Court, the appropriate court of appeals and of the highest court of the state involved

Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980). The plaintiff has drawn the court's attention to the 1981 case of Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981), a case which involved an action against a placement agency for the failure to protect an abused child from beatings and sexual abuse inflicted by her foster father. The Doe case does present a factual situation in some ways analogous to the case at hand and suggests that a cause of action would lie under Section 1983 against an agency charged with default in the exercise of an affirmative duty if (1) the omission was a substantial factor leading to the denial of a constitutionally protected liberty or property interest and (2) the officials in charge of the agency being sued displayed a mental state of

"deliberate indifference" in order to "meaningfully be termed culpable under Section 1983." (emphasis added). [cites omitted]. Id. at 141. However, this case post-dates the acts complained of herein by two years and is, therefore, irrelevant for purposes of our analysis in that Harlow holds:

> If the law at the time was not clearly established, an official could not reasonably be expecated to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. . . .
>
> . . . The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an officials acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's

> duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."
>
> [citing] Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1217, 18 L.Ed. 2d 288 (1967). (emphasis added). Harlow, 102 S. Ct. at 2739.

Plaintiff would also assert that defendants' inaction subjects them to liability for the deprivation of decedent's life pursuant to the duties imposed by Section 20-7-640 et seq. of the South Carolina Code of Laws 1976, as amended. It is true that Sections 20-7-640 and 20-7-650 outline the general responsibilities of the Department of Social Services and the local agency with respect to reporting and referral of cases of child abuse, the promulgation of programs, the facilitation research in the area, and the staffing and training of its

investigative services. However, the court is not of the opinion that notice of these duties is tantamount to a conclusion that the law "clearly established" that the defendants' failure to provide adequate training for social workers responsible for detecting child abuse or failure to supervise would subject them to liability under the Fourteenth Amendment of the United States Constitution.

It can hardly be said that in May of 1979 the law "clearly established" that an action for civil liability premised under the Fourteenth Amendment would lie against a state or county department of social services board member or home health care nurse for the failure to adequately train or supervise social workers dealing with abusive parent(s) when this court is not convinced in March of 1983 that such a

cause of action exists. If this judge of a federal court is uncertain, is it fair to find the defendants liable because they, too, were uncertain? Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982). This court finds that the State Board members, the County Board members, and Barbara Locklair, sued in their individual capacities are entitled to the defense of qualified immunity as set forth in Harlow and does hereby grant their motions to dismiss as to all causes of action alleged in the complaint. (emphasis added).

For the foregoing reasons and in view of the cited authorities,

IT IS HEREBY ORDERED that the complaint be dismissed in its entirety as against the Commissioner, the members of the State Board of the Department of Social Services and Barbara Locklair

sued in both their official and individual capacities.

IT IS FURTHER ORDERED that the complaint as it asserts a cause of action against the members of the Richland County Board of the Department of Social Services in their individual capacities be dismissed in its entirety.

IT IS FURTHER ORDERED that the cause of action under the South Carolina Wrongful Death Act, Sections 15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended, be dismissed as against the members of the Richland County Board of the Department of Social Services sued in their official capacities.[3]

---

[3]As it remains, plaintiff's complaint asserts causes of action against the

IT IS SO ORDEREED this 4th day of March, 1983, at Columbia, South Carolina.

s/ Clyde H. Hamilton
United States District Judge.

members of the Richland County Board of the Department of Social Services sued in their official capacities under 42 U.S.C. Sections 1983 and 1988.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Karole K. Jensen, as Administratrix of the Estate of Sylvia R. Brown, Deceased, Plaintiff, vs. Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services; Robert Kneece, Fred G. Scott, Samuel Smith, Agnes Wilson, Oscar P. Butler, Jr., John C. Williams, Jr., and Lucy C. Trower, individually and in their official capacities as members of the State Board of the Department of Social Services; Collie L. Moore, W. H. Neal, Catherine Morris, Allen Dowdy, Arlene	NO. 82-2061-15 SUPPLEMENTAL ORDER

B. Andrews, Beatrice)
Sumter, Robert E.)
Alexander, Melissa)
Burnette, individ-)
ually and in their)
official capacities)
as members of the)
Richland County)
Board of the Depart-)
ment of Social)
Services; Mary)
Williams and)
Patricia Jones,)
individually and in)
their official capa-)
cities as Social)
Workers for the)
South Carolina)
Department of Social)
Services; and)
Barbara Locklair,)
individually and in)
her official)
capacity as a "Home)
Health Nurse"for the)
South Carolina)
Department of)
Social Services,)
Defendants.)
_____)

This matter is before the court upon plaintiff's two-pronged motion: to amend or alter this court's judgment of March 4, 1983, and for leave to file an amended complaint. These motions are

brought pursuant to Rule 59(e) and Rule 15(a) of the Federal Rules of Civil Procedure, respectively. Rule 59 generally provides for the grant of a new trial or for the alteration or amendment of a judgment (emphasis added). This court's order of March 4, 1983, did not result in a judgment against the plaintiff since the court did not direct the entry of final judgment pursuant to Rule 54(b). Nonetheless, under the court's inherent power to reconsider and revise any interlocutory order, as recognized by Rule 54(b), the court has considered in great detail the arguments set forth by the plaintiff in her motion and accompanying memoranda. Upon serious reconsideration of the matter, the court adheres to and does hereby expend the scope of its ruling of March 4, 1983.

After hearing oral argument on the instant motion to reconsider/amend on June 28, 1983, and conducting extensive research on the claims presented by the plaintiff in her complaint filed August 16, 1982, her memoranda in support of the instant motion, and in her proposed amended complaint, as submitted to the court on February 25, 1983, the court is of the considered opinion that this plaintiff has failed entirely to state a cause of action under 42 U.S.C. Section 1983 against any of the defendants named in the complaint.[1] While the court notes

---

[1]The dismissal of the plaintiff's action under 42 U.S.C. Section 1983 will, of course, result in a dismissal of her claim for attorney's fees pursuant to 42 U.S.C. Section 1988 since she is not entitled to such fees until she has "prevailed on the merits of at least some of [her] claims." Hanrahan v. Hampton, 446 U. S. 754, 758, 100 S. Ct. 1987, 1989, 64 L.Ed. 2d 670 (1980).

Morris, Andrews, Sumter, Alexander, Burnett and later joined by defendant Dowdy) and the third motion to dismiss filed on January 13, 1983, (by defendant Locklair) were never joined by defendants Williams and Jones, the court is constrained to conclude that the complaint fails also to state a claim against these two latter defendants.[2] As set forth in 5 C. Wright and A. Miller, Federal Practice and Procedure Section 1357 (1973), "Even if a party does not make a formal motion, the court on its

---

[2]The court also notes that as of June 28, 1983, the date of oral argument on the instant motion, the Defendant Patricia Jones had not been served with a summons and complaint in this action. A motion to dismiss pursuant to Rule 41(b) and Proposed Rule 4(j) was filed on her behalf on March 11, 1983. However, because the court is of the opinion that the action should be dismissed as to all parties, Ms. Jones' motion need not be reached.

own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim."

In response to the various motions to dismiss filed in late 1982 and early 1983 by the defendants herein, the court heard oral argument on February 25, 1983. On March 4, 1983, the court issued its ruling wherein the plaintiff's claim was dismissed in its entirety against the Commissioner of the South Carolina Department of Social Services, the members of the State Board of the Department of Social Services, and Barbara Locklair, such dismissal being based on the applicability of eleventh amendment immunity afforded to the states under the United States Constitution and the doctrine of "qualified immunity."[3] The complaint was

---

[3] Harlow v. Fitzgerald, ___ U. S. ___, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (1982).

also dismissed against the members of the Richland County Board of the Department of Social Services sued in their individual capacities under the doctrine of "qualified immunity." The plaintiff's pendent state claim under the South Carolina Wrongful Death Act, Sections 15-51-10, 15-51-20 and 15-51-40 of the Code of Laws of South Carolina 1976, as amended, was dismissed on the basis of South Carolina's doctrine of sovereign immunity. See also United Mine Workers of America v. Gibbs, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

As it remained, the plaintiff's complaint of August 16, 1982, asserted causes of action under 42 U. S. C. Section 1983 and 1988 against the members of the Richland County Board sued in their official capacities and against defendants Mary Williams and

Patricia Jones, sued both officially and individually, inasmuch as they had filed no motions to dismiss. By way of reiteration, the court now is of the opinion that not only were the above named defendants properly dismissed for the reasons set forth in the court's order of March 4, 1983, but that all defendants named in the plaintiff's complaint are entitled to dismissal pursuant to Rule 12(b)(6) of the Federal rules of Civil Procedure for failure to state a claim upon which relief may be granted.

DISCUSSION

The plaintiff, Karole K. Jensen, has attempted to assert a cause of action under 42 U. S. C. Section 1983 against the above named officials for

the wrongful death of her decedent, Syliva R. Brown, a minor child who was the victim of parental child abuse. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any cittzen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other propre proceeding for redress. (emphasis added).

As set forth by the United States Supreme court, "[t]he first inquiry in any Section 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' of the United States." Martinez v. California, 444 U.S. 277, 284, 100 S. Ct. 553, 558, 62 L.Ed.2d 481 (1980), quoting Baker v. McCollan, 443 U.S.

137, 140, 99 S. Ct. 2689, 2692, 61 L.Ed. 2d 433 (1979). Section 1983 is a remedial statute only, (emphasis added). It provides remedy only, and the substantive right must be found in the Constitution and laws. Chapman v. Houston Welfare Rights Organization 441 U.S. 600, 99 S. Ct. 1905, 60 L.Ed.2d 508 (1979). In 1980, the U. S. Supreme Court held that the phrase "secured by the Constitution and Laws" includes federal statutory law as well as the Constitution. Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed 2d 555 (1980). The plaintiff herein contends that her deceased was deprived of her fourteenth amendment "right to life" and of rights secured under 42 U.S.C. Section 5104 et seq., The Child Abuse Prevention and Treatment Act of 1974,

and 42 U.S.C. Section 620 (Part B of Title IV of the Social Security Act).[4]

FOURTEENTH AMENDMENT

Turning first to the plaintiff's constitutional claim: the plaintiff contends that (1) the failure of the Commissioner and the State and County Boards of the South Carolina Department of Social Services to promulgate guidelines for social workers dealing with abused children and to adequately

---

[4]The plaintiff does not specifically assert either of the above cited statutes in her complaint or proposed amended complaint. However, since she does allege in her original complaint that the action is brought pursuant to "the constitution and laws" of the United States and does address the specific statutes in her present motion before the court, the court will fully discuss the applicability of these statutes infra.

train and supervise such social workers and (2) the failure of the social workers themselves to adequately protect the infant Sylvia R. Brown, deprived her decedent of her fourteenth amendment right not to be deprived of life without due process of law. Complaint at Paragraphs 8 and 19. "Although the right to life is obviously an interest of constitutional dimension, its deprivation alone - cannot give rise to a claim under section 1983." Dollar v. Haralson County, Ga., 704 F.2d 1540 (11th Cir. 1983).

The fourteenth amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

Since the amendment is directed to the states, it can be violated only by conduct that may be fairly characterized as state action (emphasis added). Lugar v. Edmondson Oil Co., Inc., ___ U.S. ___, 102 S. Ct. 2744, 73 L.Ed2d 482 (1982). As the Supreme Court asserted in Jackson v. Metropolitan Edison Co., 419 U. S. 345, 349, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974):

> In 1883, this Court in the Civil Rights Cases, 109 U.S. 3 [3 S. Ct. 18, 27 L.Ed. 835], affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield.

In 1982, the United States Supreme Court reaffirmed this essential dichotomy between "state action" and

private conduct in the cases of Lugan v. Edmondson Oil Co., ___ U. S. ___, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982); Rendell-Baker v. Kohn, ___ U.S. ___, 102 S. Ct. 2764, 73 L.Ed.2d 418 (1982) and Blum v. Yaretsky, ___ U.S. ___, 102 S. Ct. 2777, 73 L.Ed.2d 534 (1982). In Lugar the court set forth:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order. (emphasis added). 102 S. Ct. at 2754.

Gary C. Leeds, professor of law at the T. C. Williams School of Law of the University of Richmond, explored in great detail the development of the doctrine of "state action" and the limitation it imposes on federal courts in the North Carolina Law Review article entitled, State Action Limitations on Courts and Congressional Power. 60 N.C.L. Rev. 747 (1982). In the article, Professor Leeds sets forth an admonition which, in the court's opinion, has particular application to the case at hand:

> Because of the state action doctrine, courts cannot reach most abridgments of liberties by individuals. This limitation, however unjust on occasion, is consistent with several vital principles in our system of government that should not be lightly disregarded in order to achieve a particular "good" result

in a hard case. Id. at 752.

Karole K. Jensen, the plaintiff herein, presents to the court an emotionally compelling argument; child abuse is a most noxious social evil that demands serious consideration and concerted action to stem its widespread existence. However, it has been of great concern to this court since the inception of the instant case that plaintiff's decedent, Sylvia Brown, was deprived of her life by her parent, a private individual. (emphasis added). As the Supreme Court has repeatedly held, purely private discriminatory conduct, although wrongful and reprehensible, is not prohibited by the fourteenth amendment. Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L.Ed. 1161 (1948). While the court observes that there was some state

involvement with the plaintiff's decedent prior to her death in May of 1979, the finding of some incidental state action is not the end of the inquiry. The crucial judicial inquiry is whether the state and thereby, its officials, should be held responsible, whether the alleged infringement of the plaintiff's decedent's federal right by her parent is "fairly attributable to the state". Lugar, 102 S. Ct. at 2754. See also Peterson v. City of Greenville, 373 U.S. 244, 83 S. Ct. 1119, 10 L.Ed.2d 323 (1963).

At the outset of the court's inquiry, the court notes that Judge William W. Wilkins of this district held in the case of Karole K. Jensen, as Administratrix of the Estate of Michael Clark v. Conrad, et al., C.A. No. 82-2059-14, by order of June 16, 1983,

that the due process clause of the fourteenth amendment constituted an appropriate federal basis for a suit brought under 42 U.S.C. Section 1983 by the plaintiff herein in the Anderson division. Although the factual setting in Clark differed substantially from the case at hand, the plaintif's theory of liability was virtually identical to that asserted herein. Although Judge Wilkins found the necessary "state action" to support a fourteenth amendment violation, this court is not absolutely bound by his determination in Clark. While this court might find his opinion highly persuasive on the issue, "a District court decision which has not stood the acid test of appellate review cannot be regarded as authoritative, much less dispositive . . . ." Bank of Marin v. England, 352 F.2d 186, 189,

n.1 (9th Cir. 1965), reversed on other grounds, 385 U.S. 99, 87 S. Ct., 274, 17 L.Ed.2d 197 (1966).

Cases involving "state action" analysis arise from a variety of factual backgrounds. However, the instant case is "obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the state so as to make it 'state' action for the purposes of the Fourteenth Amendment." [cites omitted]. Blum v. Yaretsky, 102 S. Ct. at 2785. This case also differs from "state action" cases in which state officials enforced state laws and regulations, for example, garnishment or attachment statutes, at the behest of a private individual. "[I]n such cases the question typically is whether the

private motives which triggered the enforcement of those laws can fairly be attributed to the State." [cites omitted]. Id. Here, the plaintiff Karole K. Jensen, as did the plaintiffs in Blum, seeks to hold state officials liable for the action of a private party, Sylvia R. Brown's mother.

In Blum, a class of Medicaid patients who were residents of a private New York nursing home brought an action alleging that they had not been afforded adequate notice of decisions made by nursing home officials to transfer them to lower level care facilities or notice of their right to an administrative hearing to challenge those decisions. The plaintiffs asserted that these omissions were in violation of their fourteenth amendment right of due process. The state of New York

subsidized the costs of the private facility, paid the expenses of patients, licensed the facility and required extensive reporting of all transfer decisions. Additionally, when the patients were transferred to lower level care facilities, the state correspondingly reduced their Medicaid benefits. Despite this substantial state involvement, the Court refused to find the requisite "state action" necessary to hold the state defendants liable for the transfer decisions and thus, for a fourteenth amendment violation. Id. at 2790.

In so holding, the Supreme Court in Blum outlined three important points with respect to the essential "state action" analysis required when a party asserts a fourteenth amendment violation. First, the Court noted:

> [A]lthough it is apparent that nursing homes in New York are extensively regulated, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." Jackson v. Metropolitan Edison Co., supra. 419 U.S. at 350, 95 S. Ct., at 453. The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Id., at 351, 95 S. Ct., at 453. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties. (emphasis in the original). Blum v. Yaretsky, 102 S. Ct. at 2786.

The Court next asserted an important principle which is specifically applicable to, if not controlling in, the case at hand:

> [A]lthough the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. [cites omitted]. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. [cites omitted], (emphasis added). Id. at 2786.

The third point noted by the Court in Blum has no application to the case at hand for it could hardly be said that the private entity herein has exercised powers that are "traditionally the exclusive prerogative of the State." Blum citing, Jackson v. Metropolitan Edison Co., supra, at 353, 95 S. Ct., at 454; see Flagg Bros., Inc. v. Brooks, 436 U. S. 149, 157-161, 98 S. Ct. 1729, 1733-36, 56 L.Ed.2d 185 (1978). Cases

under this line of analysis generally fall within what is commonly known as the "public function doctrine"; private entities performing functions traditionally performed by government. Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).

In applying the Blum analysis to the case at hand, the plaintiff would assert that the state and county officials' responsibility for her decedent's death arises from the duties imposed by South Carolina statutory law, found at Sections 20-7-640 and 20-7-650 of the South Carolina Code of Laws 1976, as amended.[5] Section 20-7-640 outlines the duties of the State Department of

---

[5]The plaintiff has never, by memorandum, through oral argument or otherwise,

Social Services and Section 20-7-650 details the duties of the local child protective agency, here, the Richland County Board of the Department of Social Services. As previously set forth in this court's order of March 4, 1983, Sections 20-7-640 and 20-7-650 outline the general responsibilities of the state department and the local agency with respect to reporting and referral of cases of child abuse, the promulgation of programs, the facilitation of research in the area,

---

specifically asserted her theory of "state action" on which she bases her claim of a fourteenth amendment violation. Therefore, the court must proceed, in an admittedly speculative fashion, to apply the "state action" analysis set forth by the United States Supreme Court to the situation at hand.

and the training of their investigative personnel. The more specific duties imposed by these sections are found in Section 20-7-650 wherein the local agency is charged with investigating a report of suspected abuse or neglect within twenty-four hours of its receipt and with making its findings with respect to such reported abuse within sixty days. Section 20-7-650(C). The agency is required to communicate cases of indicated abuse to the Statewide Central Registry, Section 20-7-650(E), and in such cases of indicated abuse, the agency is charged in subsection (G) with, ". . . providing, directing or coordinating then appropriate and timely delivery of services to children found to be abused or neglected and those responsible for their care or others exercising temporary or permanent

control over such children . . . ." Additionally, if such protective services are initiated, the agency is required to notify the Family Court of the jurisdiction for the purpose of scheduling a hearing as to the reasonableness of such offered services. Section 20-7-650(H).

The court acknowledges that these statutes impose certain duties upon the state and local agencies with regard to the investigation of child abuse and the subsequent provision of services. However, the court is not convinced that these statutes amount to "regulation" of the conduct of a parent abuser or coercion or significant encouragement of his or her conduct so as to provide the required "state action" under the fourteenth amendment. As set forth

previously, "state action" is an essential preliminary condition to Section 1983 jurisdiction, and failure to find "state action" will require dismissal of the case. Martinez v. California, 444 U. S. 277, 283-85, 100 S. Ct. 553, 558-59, 62 L.Ed. 2d 481, 488-89 (1980) and Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980).

Clearly, these statutes do not "regulate" private individuals within the scope of the analysis set forth by the Supreme Court in Jackson v. Metropolitan Edison, Co., supra, or Blum v. Yaretsky, supra. Indeed, the court is instructed by the Supreme Court instead to focus upon whether, by virtue of Sections 20-7-640 and 20-7-650 and the duties imposed therein, the state agency, the local agency or the social workers themselves have, ". . . exercised coercive power or [have]

provided such significant encouragement, either overt or covert, that the choice [of the decedent's parent] must in law be deemed to be that of the State." Blum v. Yaretsky, 102 S. Ct. at 2786. It would indeed be ludicrous to suggest that the state or any of its officials coerced or encouraged, in an respect, the abuse and subsequent killing of plaintiff's decedent. The statutes and the very existence of the state and local agencies are directed toward the protection of such children. Subsection (A) of Section 20-7-650 provides: "It is the purpose of this section to encourage the voluntary acceptance of any service offered by the child protective service agency in connection with child abuse and neglect, or any other problem of a nature affecting the stability of family life." (emphasis added).

The court understands that part of the plaintiff's claim rests upon a claim of inaction or insufficient action by the defendants herein; that the defendants simply failed to adequately protect the decedent, Sylvia R. Brown, from her abusive parents. The plaintiff, as did Judge Wilkins in his previously mentioned order of June 16, 1983, relies heavily on the case of Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981). The Second Circuit in Doe did not address the issue of "state action" under the fourteenth amendment, but in this court's mind there are two crucial distinctions between Doe and the case at hand for purposes of "state action" analysis. In Doe, as in Blum, the private entity (the foster home and thereby, the foster father, in Doe and

the private nursing home in Blum) was subject to direct state regulation.[6] Both were state licensed private entities. While the Court in Blum noted that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment, " quoting Jackson v. Metropolitan Edison Co., 419 U.S. at 350, 95 S. Ct. at 453, the close and continuing supervisory relationship

---

[6]As a placement agency, [the New York City Department of Social Services] was charged by state law with the task of periodically inspecting and annually recertifying the Senerchia home. (New York Social Services Law Sections 376, 378)(McKinney). Its alleged failure to perform this duty is the gravamen of plaintiff's complaint." Doe, 649 F.2d at 137.

between the state agency and the foster father in Doe would probably satisfy "state action" analysis under Blum and Jackson.

In the instant case, the court is of the opinion that there is not a sufficiently close nexus between the state of South Carolina and Sylvia Brown's mother so that the action of the latter may be fairly treated as that of the state. Blum, 102 S. Ct. at 2786. While the state may offer "services" to an abusive parent, the parent is in no sense under the obligatory control of the state and is not even required to accept such "services" as the agencies may offer. As set forth in Sections 20-7-650(J) of the South Carolina Code of Laws 1976, as amended:

> If at any time after the initiation of protective services by the agency those receiving services

> indicate a refusal to cooperate, the agency shall withdraw. If the facts so warrant, the agency may petition the Family Court to invoke the jurisdiction of the court under the Family Court Act to intervene, but in no case shall the agency threaten such action to coerce participation. (emphasis added).

Absent intervention by the Family Court of the jurisdiction, the parent of an abused child may accept or reject, at his or her own will, the offered guidance of the state. This court is unwilling to convert non-obligatory state supervision or guidance into "regulation" in order to hold the state responsible for the acts of Sylvia R. Brown's mother under the fourteenth amendment. Blum, 102 S. Ct. at 2786. To stretch the concept of "state action" so far would, in essence, require a finding of "state action" in every instance of state involvement with a private individual.

The second and very important distinction between the case at hand and the Doe case is the fact that the child in Doe was in the legal custody of the state of New York. (emphasis added). Sylvia R. Brown was in no respect in the custody of the state of South Carolina. The agency had not, to this court's knowledge, even initiated proceedings under Section 20-7-736, which provides the Family Court of a particular jurisdiction with the power to remove a child from its parent's custody only upon a showing by clear and convincing evidence that the child cannot be protected from further harm without being so removed.

Legal custody is a parental right that is not to be lightly disregarded:

> It is a right protected both by the common law and by statutes. Since the right of parents to the custody

> of their minor children is both a natural and a legal right, the law should not disturb the parent-child relationship except for the strongest reasons, and only upon a clear showing of a parent's gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of the child. 59 Am.Jur.2d Parent and Child Section 25 (1971).

However, once that right is legally forfeited and the state assumes custody, the state then is charged with "affirmative duties, the non-feasance of which may violate the constitution." Doe, 649 F.2d at 141. This court is of the opinion that while the state and county officials may have been under a legal duty to offer protective services to the custodians of abused children, absent legal custody of a child by the state, the officials had no general duty to unequivocally ensure the safety of that child twenty-four hours a day. As stressed by the Eleventh Circuit in

Dollar v. Haralson County, Ga., 704 F.2d 1540 (11th Cir. 1983):

> In determining whether a constitutional deprivation has occurred, courts must examine whether the defendant was under any obligation to the particular plaintiff. The question of the existence of such a duty is an issue of law. The court, not the jury, must determine "whether, upon the facts in evidence, [a duty] exists between the parties that the community will impose a legal obligation upon one for the benefit of the other." W. Prosser Handbook of the Law of Torts 206 (1971). The duty focuses upon the relationship. (emphasis added). Id. at 1543.

The relationship between these officials and the plaintiff's decedent was legally insufficient to impose upon them the legal obligation of, in essence, becoming the absolute insurers of Sylvia R. Brown's safety. The duties of the defendants in this situation were to conduct an investigation and offer their services to the decedent's legal

custodian. If they performed these duties negligently, that is a matter of state tort law. Therefore, the court is of the opinion that legal custody and/or direct supervisory control over or regulation of the parent or caretaker are necessary prerequisites to a finding of "state action," for the purposes of the fourteenth amendment, in the instant case. As set forth by the Seventh Circuit Court of Appeals in the 1982 case of Bowers v. DeVito, et al., 686 F.2d 616 (1982):

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. Brazier v. Cherry, 293 F.2d 401, 404-05 (5th Cir. 1961). But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators

> but it does not violate the due process clause of the Fourteenth Amendment, or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone, it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order. (emphasis added). Id. at 618.

The plaintiff's decedent's right to life was protected by the fourteenth amendment, but it only protected her from deprivation by the "State . . . of life . . . without due process of law." Although the state's offer of protective services was action by the state, the deprivation of the decedent's life cannot be fairly characterized as "state action." Regardless of whether, as a matter of state tort law, the state and local boards of the Department of Social Services, the commissioner, Barbara Locklair and the social workers,

Williams and Jones, could be said to have had a "duty" to avoid harm to the infant or to have proximately caused her death, the court does hereby find that the defendants did not "deprive" the plaintiff's decedent of life within the meaning of the fourteenth amendment. Martinez v. State of California, 100 S. Ct. at 559. For the foregoing reasons, the court concludes that the plaintiff has failed to state a constitutional claim for which relief may be afforded under 42 U. S. C. Section 1983, as against all defendants.

STATUTORY CLAIM

The plaintiff next contends that her decedent was deprived of "rights" secured under the Child Abuse Prevention and Treatment Act of 1974, codified at

42 U.S.C. Section 5101 et seq., and Part B. of Title IV of the Social Security Act, 42 U.S.C. Section 620 et seq. In 1980, the United States Supreme Court construed 42 U.S.C. Section 1983 as authorizing suits to redress violations by state officials of rights (emphasis added) created by federal statutes. Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed. 2d 555 (1980); see also Middlesex County Sewerage Authority, et al. v. National See Clammers Association, 453 U.S. 1, 101 S. Ct. 2615, 69 L.Ed. 2d 435 (1981).

However, in order to assert a cause of action under 42 U.S.C. Section 1983 for the violation of a federal statute, that statute must create a "right, privilege or immunity" within the meaning of Section 1983. The issue in the instant case then becomes; did the

plaintiff's decedent have any "rights" secured by the Child Abuse Prevention and Treatment Act of 1974 or Part B of Title IV of the Social Security Act. Thiboutot only grants the plaintiff a cause of action under Section 1983 if the statutes afforded her decedent a substantive "right."

The statutes cited by the plaintiff deal with the appropriation of federal funds to states for child welfare services, 42 U.S.C. Section 620 et seq., and more specifically, for services directed toward the prevention of child abuse, 42 U.S.C. Section 5101 et seq. Section 5103 of the Child Abuse Prevention and Treatment Act provides in pertinent part:

> (b) Grants to States; qualifications for assistance; reduction of awards; compliance of social security provisions with certain requirements

(1) The Secretary, through the Center, is authorized to make grants to the States for the purpose of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

In order for a State to qualify for assistance under this subsection, such State shall-

(A) have in effect a State child abuse and neglect law which shall include provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any State or local law, arising out of such reporting;

(B) provide for the reporting of known and suspected instances of child abuse and neglect;

(C) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child, as well as that of any other child under the same care who may be

in danger of abuse or neglect;

(D) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such administrative procedures, such personnel trained in child abuse and neglect prevention and treatment, such traianing procedures, such institutional and other facilities (public and private), ;and such related multidisciplinary programs and services as may be necessary or appropriate to assure that the tate will deal effectively with child abuse and neglect cases in the State;

(E) provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians;

(F) provide for the cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services;

(G) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such

proceedings;

(H) provide that the aggregate of support for programs or projects related to child abuse and neglect assisted by State funds shall not be reduced below the level provided during fiscal year 1973, and set forth policies and procedures designed to assure that Federal funds made available under this subchapter for any fiscal year will be so used as to supplement and, to the extent practicable, increase the level of State funds which would, in the absence of Federal funds, be available for such programs and projects;

(I) provide for dissemination of information to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat instances of child abuse and neglect; and

(J) to the extent feasible, insure that parental organizations combating child abuse and neglect receive preferential treatment.

If a State has failed to obligate funds awarded under this subsection within eighteen months after the date of award, the next award under this subsection made after the expiration of such period shall be

reduced by an amount equal to the amount of such unobligated funds unless the Secretary determines that extraordinary reasons justify the failure to so obligate.

3) Programs or projects related to child abuse and neglect assisted under part A or B or title IV of the Social Security Act shall comply with the requirements set forth in clauses (B), (C), (E), and (F) of paragraph (2). (emphasis added).

Part B of Title IV of the Social Security Act generally provides for the appropriation to the individual states of a designated sum of money each fiscal year, "For the purpose of enabling the United States, through the Secretary, to cooperate with State public welfare agencies in establishing, extending, and strengthening child-welfare services . . . ." 42 U.S.C. Section 620, "Child-welfare services" include "public social services which supplement, or substitute for, parental care and

supervison for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children, . . ." 42 U.S.C. Section 625.

These statutes do address by means of federal appropriations, the problem of child abuse and neglect in the individual states. However, the fact that abused children are the in direct recipients of federal largess does not, in and of itself, create enforceable "rights" in the statute itself. Perry v. Housing Authority of the City of Charleston, 664 F.2d 1210 (4th Cir. 1981). The plaintff has not directed the court to any substantive provision of the two acts which would have given her decedent a tangible right to the unqualifiedly protected from, or free

from abuse within the contemplation of Section 1983.

The situation involved in this case is closely analogous to that in the recent Supreme Court decision of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981). In Pennhurst, the Court held that the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (42 U.S.C. Section 6000 et seq.,) created no substantive rights to "appropriate treatment" in the "least restrictive" environment for mentally retarded persons. In so holding, the Court asserted:

> There is virtually no support for the lower court's conclusion that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. The Act nowhere states that that is its purpose. Quite the contrary, the Act's language and structure demonstrate that it

is a mere federal-state funding statute. (emphasis added). Id. 67 L.Ed. at 708.

The Fourth Circuit had the opportunity to apply the Supreme Court's Pennhurst ruling in the 1981 case of Perry v. Housing Authority of Charleston, 664 F.2d 1210 (4th Cir. 1981). In Perry, the court concluded that the United States Housing Act of 1937 did not created any legally cognizable "rights" in tenants of programs funded under the housing statutes and consequently, disallowed any action under 42 U.S.C. Section 1983.

A thorough review of the language, structure and legislative histories of both the Child Abuse Prevention and Treatment Act of 1974 and Part B of Title IV of the Social Security Act reveal that they too are but mere federal-state funding statutes. Indeed,

the first sentence of the legislative history of the Child Abuse Prevention Act reads:

> The Committee on Education and Labor, to whom was referred the bill (S.1191) to provide financial assistance for a demonstration program for the prevention, identification, and treatment of child abuse and neglect, to establish a National Center on Child Abuse and Neglect, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass. (emphasis added). 1974 U. S. Code Congressional and Administrative News, p. 2763.

The federal statutes cited by the plaintiff in her memorandum in support of her motion afforded her decedent no "rights, privileges, or immunites" within the meaning of 42 U.S.C. Section 1983. Middlesex, supra; Pennhurst, supra and Perry, supra. As set forth previously, 42 U.S.C. Section 1983 itself creates no substantive rights,

such "rights", if any exist, must be found in the Constitution and laws of the United States. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 99 S.Ct. 1905, 1915, 60 L.Ed. 2d 508 (1979).

The plaintiff also bases her statutory claim in part on regulations under Part B of Title IV of the Social Security Act. However, since the regulations were promulgated under the statute, they cannot exceed its substantive scope and create an enforceable right when the court has determined that the statute itself creates no such "right." Dopico v. Goldschmidt, 518 F. Supp. 1161 (S.D.N.Y. 1981).

Therefore, the court concludes that the plaintiff has also failed to assert a cognizable claim against any of the

defendants named herein under 42 U. S. C. Section 1983 for a violation of a "right secured by the laws of the United States."

CONCLUSION

The court has considered, in great detail, the claims asserted by the plaintiff, Karole K. Jensen in her motion to reconsider/amend as filed March 14, 1983. Additionally, the court has thoroughly reviewed the plaintiff's proposed amended complaint, as submitted to the Court on February 25, 1983. The plaintiff's proposed amended complaint sets forth more completely the facts surrounding her decedent's death. However, it does not alter the legal

theories upon which she proceeds.[7] Nonetheless, the additional facts asserted in the proposed amended complaint do not alter this court's opinion with regard to the existence of "state action" in this case or as they would apply to any claimed statutory infringement. Therefore, the court does hereby deny the plaintiff's motion to amend the complaint.

With regard to the plaintiff's motion to alter or amend its "judgment"

---

[7]The plaintiff did assert an eighth amendment claim in her proposed amended complaint. However, at oral argument held June 28, 1983, the plaintiff's counsel candidly and correctly acknowledged that the factual situation presented herein could not support a claimed eighth amendment violation within the meaning of 42 U.S.C. Section 1983.

of March 4, 1983, the court notes that today's ruling was perhaps foreshadowed by the court in its March 4, 1983, order wherein it was stated:

> It can hardly be said that in May of 1979 the law "clearly established" that an action for civil liability premised under the Fourteenth Amendment would lie against a state or county department of social services board member or home health care nurse for the failure to adequately train or supervise social workers dealing with abusive parent(s) when this court is not convinced in March of 1983 that such a cause of action exists. (emphasis added). Order of March 4, 1983 at 20.

For the foregoing reasons and based on the cited authorities, the court concludes that the plaintiff has failed to assert either a constitutionally or statutorily protected "right" within the meaning of 42 U.S.C. Section 1983. The court adheres to its ruling of March 4, 1983, in that the parties were properly dismissed for the reasons set forth

therein. However, the court is now of the opinion that all parties to this action should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for the plaintiff's failure to assert a claim upon which relief may be granted.

IT IS THEREFORE ORDERED that plaintiff's motion to alter or amend judgment and to amend the complaint is hereby denied.

IT IS FURTHER ORDERED that the complaint be, and the same hereby is, dismissed as to all defendants named herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 18th day of July, 1983, at Columbia, South Carolina.

Clyde H. Hamilton
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

CIVIL ACTION NO. 82-2059-14

Karole K. Jensen, as Administratrix of the Estate of Michael Clark, Deceased, Plaintiff,	)	
vs.	)	ORDER
Virgil L. Conrad, in his individual and official capacity as Commissioner of the Department of Social Services;	)	
Mary D. Dusenberry, George D. Hamilton, Oscar P. Butler, Ph.D., John C. Williams, Jr., Lucy C. Thrower, Agnes Wilson, Ph.D.,and W. Jerry Fedder, individually and in their official capacities as members of the State Board of the Department of Social Services;	)	
Jerry Herd, Harold E. Simpson, Ophelia W. Smith, J. Furman Gerrard, and Odell Short, individually and in their official capacities as members of the Anderson County Board of the Department of Social Services;	)	
Kenneth Pryor, individually and in his official capacity as Director	)	

of the Anderson County Department of Social Services;

Dawn Hawkins, individually and in her official capacity as Program Director for Human Services of the Anderson County Department of Social Services;

Susan Straup individually and in her official capacity as Protective Services Supervisor of the Anderson County Department of Social Services;

Defendants.

This matter is before the Court on motions to dismiss filed pursuant to Fed.R.Civ.P. 12(b)(6) by members of the Boards of the State Department of Social Services and Anderson County Department of Social Services. On January 24, 1983, a hearing was held on these motions. Shortly thereafter, affidavits were filed by movants reaching the merits of Plaintiff's claim. Consequently, the Court notified the parties that the pending motions to dismiss would be

viewed as motions for summary judgment under Fed.R.Civ.P. 56(b) and provided Plaintiff an opportunity to file responsive affidavits. Having now fully considered the additional affidavits and legal briefs offered by both parties, the Court is of the opinion that summary judgment should be entered in favor of movants.

FACTS

This action arises out of the death by beating of Michael Clark, a three-year-old child, apparently by the live-in boyfriend of Michael's mother.[1]

---

[1]See generally the report of the investigation into the death of Michael Clark entitled "Report of Investigations of Circumstances Surrounding the Deaths of Certain Children in South Carolina Directly Resulting from Physical Abuse and Neglect or Abandonment."

The Anderson County Department of Social Services became involved prior to Michael's death when it received a report on February 28, 1980 from the Principal of New Prospect Elementary School concerning the possible abuse of Michael's older brother. A protective service caseworker was subsequently sent to the school to investigate the matter. Based on the caseworker's interview with the child and his teacher, she apparently decided that the family should be officially contacted. However, after repeated attempts, she failed to locate the home. Consequently, after the expiration of 60 days, the case was classified as "unfounded" and officially closed. No further action was taken by the Anderson County Department of Social Services

prior to Michael's death on June 23, 1980.[2]

The essence of Plaintiff's resulting Complaint against movants seems to be that the Board of the State Department of Social Services failed to provide proper training for protective service caseworkers in violation of state law and that the Board of the Anderson County Department of Social Services hired caseworkers who were inadequately trained.[3] The claim that protective service caseworkers were

---

[2]While Michael's brother was the subject of the report of child abuse, Plaintiff maintains that had this report been properly investigated, Michael's death would have been prevented.

[3]Plaintiff does raise several other allegations in her Complaint which are not specifically related to training.

inadequately trained arises primarily from the allegation that Michael's home was never located even though his correct address was readily available through several sources in the community, including the School District Headquarters and the County Food Stamp Office. Plaintiff specifically maintains that Michael's death was not prevented, as it could have been through proper protective service intervention, because caseworkers were not taught essential investigatory techniques necessary to

---

However, these allegations are not sufficiently particularized under Smith v. Ambrogio, 456 F.Supp. 1130 (D.Conn. 1978), to justify the extensive litigation which would be involved in this action. As such, they must be dismissed as insubstantial claims.

locate the parents or guardians of children who are suspected to be victims of abuse. In support of this contention, Plaintiff has submitted the affidavits of three former certified protective service caseworkers stating that the necesssary skill and knowledge to locate transitory or evasive families is not taught in the current training curriculum.[4]

Plaintiff alleges further that this failure to properly train protective service caseworkers has resulted in "a

---

[4]See affidavits of Betty Flowers, Paragraph 6; Nancy Sadler, Paragraph 5; Robin Campbell, Paragraph 6.

pattern of cases throughout the state"[5] in which the Department of Social Services has failed to properly and timely intervene to prevent child abuse. In an attempt to support this contention, Plaintiff has submitted a document entitled "Report of Investigations of Circumstances Surrounding the Deaths of Certain Children in South Carolina Directly Resulting from Physical Abuse and Neglect or Abandonment." This document is primarily a report of an investigation conducted by the South Carolina Attorney General's Office into the deaths of ten children due to abuse or neglect occurring in the state between February, 1978 and June, 1980. In each case, the protective actions

---

[5]See Plaintiff's Memorandum of Detailed Allegations, Paragraph 13(d).

undertaken by various county social services officials were critically examined.

In support of its training program, movants have submitted the affidavits of Wayne Holder, an expert in protective services training; Ramona L. Foley, the State Project Administrator for Child Protective Services and Permanency Planning; and Shirley H. Fitz-Ritzon, the State Director of Child Protective Services. Mr. Holder is the Director of the Children's Division of the American Humane Association (AHA) which was hired by the state in 1977 to develop a comprehensive training program for protective service caseworkers. Mr. Holder states that a comprehensive training program was developed by the

AHA and put into operation in 1978.[6] Based on his personal experience in protective service training in every region of the nation, he states that as a result of this program South Carolina clearly provides greater training in this area than is currently being provided on the national average.[7] Moreover, in his words, the state is "perceived as a pioneer in the area of child protection staff development."[8] Finally, Mr. Holder also states that, in

---

[6] See affidavit of Wayne Holder, Paragraphs 3 and 5.

[7] Id., Paragraphs 11 and 12.

[8] id., Paragraph 11.

his opinion, current training in South Carolina is adequate to provide protective service caseworkers with the necessary knowledge and skill to properly perform their jobs.[9]

Both Ms. Foley and Ms. Fitz-Ritzon appear to share Mr. Holder's opinion concerning the adequacy of current protective service training in the state. Each, as a result of their jobs with the State Department of Social Services, is familiar with the specific details of the training program. In describing the program, both state in their respective affidavits that it is a two-week broad-based training course covering topics including but not limited to "identifying good parenting characteristics; identifying proper

---

[9] Id., Paragraph 13.

child development; identifying characteristics of abusive and neglectful families; necessary information gathering; initial family contact; location of the family; assessment of risk; basic interviewing skills; identifying abuse injuries as opposed to accidental injuries; basic fact gathering; and proper use of foster care systems." (Emphasis added.)[10] All protective service caseworkers are required to complete this course and must pass a knowledge exam on the information presented in order to receive certification.[11] Moreover,

---

[10] See affidavit of Ramona Foley, Paragraph 12. Also see affidavit of Shirley Fitz-Ritzon, Paragraph 12.

[11] Id., Paragraph 13.

regulations prohibit caseworkers from investigating cases involving suspected child abuse prior to receiving certification. Lastly, the program also requires annual recertification of protective service caseworkers based on continuing educational requirements.[12]

---

[12]Several features of the training program were apparently considered highly innovative when developed in 1977. For example, among other achievements, the South Carolina program was the first in the nation to: (1) constitute a comprehensive training program based on competency, (2) require passage of a knowledge exam by all protective service caseworkers prior to receiving and investigating referrals, and (3) establish educational requirements for recertification. See affidavit of Wayne Holder, Paragraphs 4 and 12.

LAW

When an individual, particularly a child, is placed under the care, custody or supervision of a state governmental agency charged with a duty under state law to provide for his welfare, the failure of his governmental custodians to undertake reasonable action to protect him from obvious dangers may constitute a cause of action under 42 U.S.C. Section 1983. Doe v. New York City Department of Social Services, 649 F.2d 134, 141 (2d Cir. 1981); see generally, Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980); Withers v. Levine, 615 F.2d 158 (4th Cir. 1980). Of

course, a Section 1983 claim may not be based simply on the allegation that governmental officials violated state law in failing to take appropriate protective measures. In order to state a claim under Section 1983, it is necessary to allege a violation of federal constitutional or statutory rights. Maine v. Thiboutot, 448 U.S. 1 (1980); Ogilbee v. Western District Guidance Center, Inc., 658 F.2d 257, 258 (4th Cir. 1981). In this case, the due process clause of the fourteenth amendment constitutes an appropriate federal basis for the claim. See Jones v. The Board of Governors of the University of North Carolina, 704 F.2d 713, 717 (4th Cir. 1983).

Under the due process clause, an individual legally entrusted to the care or protection of governmental officials

has a right not to suffer injury as a proximate result of the failure of those officials to render reasonable care or protection due to their "deliberate indifference" to his welfare. Doe v. New York City Department of Social Services, 649 F.2d at 141; Orpiano v. Johnson, 632 F.2d at 1101.[13] governmental officials may be held to have acted with deliberate indifference toward an individual under their care if it is established that they

---

[13]Under the South Carolina Children's Code, S.C. Code Ann. Sections 20-7-640, et seq., it is clear that a child falls under the care of the local child protective agency at the time a report of abuse is received. In this regard, S.C. Code Ann. Section 20-7-650(c) states, in part: "Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation...."

intentionally caused him harm, knowingly allowed others to harm him, or acted with conscious indifference to his safety.[14]

In defining the concept of deliberate indifference, it is important to recognize that although it is closely associated with gross negligence, there is a significant distinction. See Doe v. New York City Department of Social Services, 649 F.2d at 143. In essence, gross negligence is the breach of reasonable standards of conduct posing obvious dangers to others while deliberate indifference involves a

---

[14] In this case, there are no allegations that movants had specific knowledge of harm suffered by Michael Clark prior to his death. Instead, Plaintiff's Complaint appears limited to the allegation that movants were deliberately indifferent to the welfare of abused children generally.

knowing lack of regard or concern for the safety of others. In the context of governmental care or custody, deliberate indifference involves the intentional failure of governmental officials assigned to the protection of an individual to concern themselves with that individual's welfare. Orpiano v. Johnson, 632 F.2d at 1101. A Governmental official may act with gross negligence toward an individual placed in his care by inadvertently exposing him to obvious and extreme dangers. However, unless that official was actually aware of the dangers involved and failed to act to provide reasonable protection due to a conscious lack of concern for the individual's safety, the

official did not act with deliberate indifference.[15]

Deliberate indifference and gross negligence are closely associated because conduct constituting gross negligence creates a rebuttable presumption of deliberate indifference. Doe v. New York City Department of Social Services, 649 F.2d at 143. This presumption arises from the fact that

---

[15] In this regard, the Court stated in Orpiano v. Johnson, 632 F.2d at 1101, "There is no question about the legal principle that where prison supervisors with knowledge of a pervasive and unreasonable risk of harm to the prisoners, fail to take reasonable remedial steps to prevent such harm, their conduct may be properly characterized as deliberate indifference ...." (Emphasis added.) Also, in Doe v. New York City Department of Social Services, 649 F.2d at 143, the court stated: "[T]here can be instances where glaring negligence may not constitute deliberate indifference..."

although gross negligence does not involve any particular mental state or actual state of conscious awareness, it does involve a breach of duty exposing others to obvious danger. Of course, a party is generally presumed to have intended the obvious consequences of his acts. Therefore, when a governmental custodian, through acts constituting gross negligence, exposes someone in his care to danger, it may be presumed he did so intentionally or deliberately.

Deliberate indifference may also be inferred from the failure of a governmental official to perform specific duties required under statute. Id. at 146. This inference arises from the fact that duties of governmental officials are generally defined at least in part by state or federal law. Consequently, it is natural to presume

that governmental officials will familiarize themselves at least with those statutes which have a direct bearing on their official conduct. However, it is very important to distinguish between those laws which simply create general, vaguely defined duties and those which mandate specific conduct under particularized circumstances. As stated by the Court in Doe v. New York City Department of Social Services, 649 F.2d at 146:

> The more a statute or regulation clearly mandates a specific course of conduct, the more it furnishes a plausible basis for inferring deliberate indifference from a failure to act, even without any specific knowledge of harm or risk. This is because failure to undertake a specific course of action in vindication of a general duty can reasonably be attributed to a bona fide difference of opinion as to how the duty should be performed. However, no such alternative explanation for nonfeasance can be raised where the task mandated is specific and unequivocal.

Based on the affidavits submitted, clearly it cannot be established that movants, through the training of protective service caseworkers, acted with deliberate indifference to the welfare of children receiving protective care. In order to prove deliberate indifference, Plaintiff must establish that movants were aware of serious inadequacies in the training program which posed known risks to protective service recipients but declined to take available action to remedy these inadequacies.[16] Of course, as previously stated, knowledge of inadequacies in the

---

[16] In Doe v. New York City Department of Social Services, 649 F.2d at 145, the Court stated:

> Of course, such [deliberate] indifference cannot exist absent

training process and the resulting risks to recipients could be inferred only if movants acted with gross negligence in establishing the training program or violated specific statutory duties. The affidavits conclusively establish that neither actual knowledge, gross negligence nor the violation of specific statutory duties may be proven in this case.

Considering first the relevant statutory duties involved, S. C. Code

---

> some knowledge triggering an affirmative duty to act . . .but actual knowledge of a specific harm is not the only type of knowledge that will suffice. Defendants may be held liable under Section 1983 if they, or in the case of an agency, its top supervisory personnel exhibited deliberate indifference to a known injury, a known risk, or a specific duty.... (Emphasis added.)

Ann. Section 20-7-660(A) states in part: "The Department of Social Services and local agencies shall also, on a continuing basis, conduct training programs for local agency staffs...." (Emphasis added.) Neither this statute nor any other code section goes any further than to merely require that a training program be established. There is no attempt to define the types of training required or to specifically require training in any particular areas. Apparently, the legislature determined that the details of any such training program should be left to the discretion of the Department of Social Services. Consequently, this code section places only a general duty on the Department of Social Services to provide training. Moreover, because the statute does not mandate any specific

course of training, an alleged violation of the statute based on a failure to provide sufficient training in a highly specific area, as in this case, simply does not furnish a plausible basis for raising an inference of deliberate indifference.[17]

Further, the concept that deliberate indifference may not be inferred from the failure to undertake a specific course of conduct in furtherance of a general statutory duty is particularly justified under the facts of this case. Unquestionably, there are virtually unlimited areas in which it would be entirely appropriate

---

[17]The result might, of course, be quite different had no training at all been provided.

and beneficial for protective service caseworkers to receive training. The Department of Social Services is ultimately given the responsibility under the law to establish educational priorities by determining which of those areas of training are most acutely needed and may be most effectively provided under the financial restraints faced by the agency. There is much room for reasonable debate and disagreement concerning how priorities should be set. However, when the decision is made and some areas of training are given greater attention at the expense of others, unless there is substantial evidence to the contrary, it should be presumed that the priorities were established in good faith. The fact that some may conclude that insufficient training is provided in a particular

area must be attributed to a difference of opinion as to how the duty to train should be accomplished rather than deliberate indifference on the part of those charged with the duty to make the necessary decisions.

Also, the affidavits establish that movants had neither actual knowledge of serious inadequacies in the training program nor acted with gross negligence from which actual knowledge could be inferred. Movants deny that the training program is inadequate. In support of movants' position that the training program was not inadequate, affidavits were submitted by Wayne Holder, an expert in the field of caseworker training, and by two high-ranking officials in the State Department of Social Services. None of the three affidavits acknowledges the existence of serious inadequacies in the

program. In fact, Mr. Holder stated explicitly that the training program provides protective service caseworkers with the knowledge and skill to properly perform their jobs. In response, Plaintiff has submitted the affidavits of three former certified protective service caseworkers who, having attended the training program, maintain that it is inadequate to provide necessary skill and knowledge to locate transitory or evasive families. However, there is no indication that these caseworkers communicated their concerns about the inadequacy of the training to movants prior to Michael Clark's death. Consequently, there is no evidence in the record indicating movants had knowledge of inadequate training. Therefore, in order to establish deliberate indifference, it must be shown that movants acted with gross

negligence in failing to provide more effective training. In order to prove gross negligence based on an alleged failure to provide proper training, it is necessary to show that a resulting pattern of injuries occurred which should have placed movants on notice of inadequacies in the training program. Withers v. Levine,[18] 615 F.2d at 161; Orpiano v. Johnson 632 F.2d at 1101.

---

[18] In Withers, the Court stated: A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular institution.... It is enough that violence and sexual assaults occur... with sufficient frequence... to reasonably apprise prison officials of the existence of the problem and the need for protective measures. (Emphasis added.)

Absent a prior pattern of injuries, gross negligence may be established only by showing that the alleged inadequacies in training were so extreme that Plaintiff's injury was an "almost inevitable" consequence. Leite v. City of Providence,[19] 463 F.Supp. 585, 590 (D.R.I. 1978); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979).

---

[19] In Leite the Court stated: Although a city cannot be held liable for simple negligent training of its police force, the city's citizens do not have to endure a "pattern" of past police misconduct before they can sue the city under Section 1983. If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a "deliberate indifference" to the resulting violations of a citizen's constitutional rights. (Emphasis added.)

In an apparent attempt to establish a prior pattern of injuries, Plaintiff submitted a document prepared by the South Carolina Attorney General's Office entitled "Report of Investigations of Circumstances Surrounding the Deaths of Certain Children in South Carolina Directly Resulting from Physical Abuse and Neglect or Abandonment." As stated previously, this document is a report of an investigation into the deaths of ten children in the state in which the actions taken by local Department of Social Services officials were criticized. However, under close examination, this report is insufficient to establish a prior pattern of injuries.

The report involves an investigation into the actions undertaken by local Department of Social

Services agencies in five cases[20] arising throughout the state over nearly a three-year period. Signficantly, each case arose in a different county involving different local Department of Social Services officials. There was no indication of repeated malfeasance or nonfeasance on the part of a particular local agency. Most importantly, however, these cases do not involve repeated errors of the same nature.

The report into the Michael Clark case indicates that his death was not prevented because of the failure of a protective service caseworker to locate his home address after a report was received of child abuse concerning his

---

[20] In one case, six of the ten children who were the subject of this report died in a fire in their home while their mother was apparently away.

brother. Also, it appears this failure may have resulted from a lack of familiarity with available sources in the county from which a current address could have been obtained. Yet of the five cases examined, the Michael Clark case was the only one in which an inability to properly locate transient families was identified even indirectly as a potential problem. Consequently, prior to Michael Clark's death, none of these cases constituted a pattern of injury from which movants should have been placed on notice of this potential inadequacy in the training program. Instead, this case represents a tragic but nonetheless isolated incident, insufficient to support a finding of gross negligence.

Moreover, it cannot be reasonably argued that the training program

provided was so grossly inadequate that the death of protective service recipients should have been anticipated as an almost inevitable consequence. As stated in the affidavit of Wayne Holder, South Carolina provides greater training than is currently provided by a majority of states.[21] Also, the current training program was originally developed by the AHA under contract with the State Department of Social Services. The AHA is currently the oldest and one of the most widely recognized national organizations involved in the development of programs and services on behalf of neglected and abused

---

[21]See affidavit of Wayne Holder, Paragraphs 11-12.

children.[22] There is nothing before the Court from which it could conclude that movants should have foreseen that the AHA would develop a training program so grossly inadequate as to almost inevitably result in preventable death. Consequently, summary judgment is granted in movants' favor.[23]

---

[22] Id. at Paragraph 12.

[23] To the extent that Plaintiff's Complaint alleges a claim against the Boards of the State and Anderson County Departments of Social Services as opposed to the members of those Boards in their individual capacities, these claims also must be dismissed as barred by the eleventh amendment. The State Department of Social Services functions as the alter ego of the state, making it immune from suit in federal court. See Jensen v. Conrad, C.A. 82-2061-15 (D.S.C. March 7, 1983); Alabama v. Pugh 438 U.S. 781 (1978). Moreover, based on the affidavit of John Crosscope, the Interim Commissioner of the State Department of Social

IMMUNITY

The caseworker or caseworkers who had personal involvement in the Michael Clark investigation do not stand on the same legal footing as movants. This is not to suggest that the Court has anopinion concerning the merits of any claim asserted against a caseworker. However, under the circumstances involved in this claim, solely from a legal perspective, the charge that movants are liable for deliberate indifference in training caseworkers must be treated differently from the

---

Services, it is clear that the Anderson County Department of Social Services is merely an arm of the State Department of Social Services, also immune from suit.

charge that caseworkers acted with deliberate indifference in the investigation of Michael's case.

The basis for this distinction is found primarily in the fact that state statutory law concerning the investigation of suspected child abuse cases is much more specific than the law dealing with the training of caseworkers. As stated previously, the state law concerning training merely creates a general, vaguely defined duty to "conduct training programs" without specifying the areas or types of training required. On the other hand, the obligations of protective service caseworkers involved in the investigation of suspected abuse cases are specifically defined in S. C. Code Ann. Section 20-7-650 which states, in part:

> (C) Within twenty-four hours of the receipt of a report of suspected child abuse or neglect, the agency shall commence an appropriate and thorough investigation to determine whether a report of suspected child abuse or neglect is "indicated" or "unfounded". The finding shall be made no later than sixty days from the receipt of the report. In conducting the investigation if the facts so warrant the agency investigator may petition the Family Court of the appropriate judicial circuit for a warrant to inspect the premises and condition of the child subject of the report. The Family Court shall issue the inspection warrant upon probable cause to believe the child is abused or neglected, as defined by this article. (Emphasis added.)

Although every feature of an appropriate abuse investigation is not expressly enumerated in Section 20-7-650, taken as a whole, the statute places very specific duties on the caseworker assigned to an investigation. Not only does the statute create strict guidelines under which an investigation must be commenced

and completed, it is also fairly specific with respect to the type of investigation which should be conducted. Particularly, an investigation is to be conducted to determine whether there is reasonable cause to suspect that a child has been abused by members of his household. To better enable the caseworker to perform his duty, a warrant may be obtained from the Family Court authorizing physical examination of a child and inspection of the home. On a finding of reasonable cause to believe a child has been physically, mentally, or sexually abused, protective services must be initiated and the Family Court notified within one week. S. C. Code Ann. Section 20-7-650(H). If services are declined, the Family Court may be petitioned to forcibly intervene. Id. at (J). Consequently, because this

statute mandates a specific course of conduct to be performed under particularized circumstances, violations of the statute by protective service caseworkers engaged in an abuse investigation may raise an inference of deliberate indifference. Doe v. New York City Department of Social Services, 649 F.2d at 146.

Moreover, the specificity of the statute dealing with abuse investigations forms the basis for another important distinction between the legal positions of movants and caseworkers. In the recent case of Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 2738-39 (1982), the United States Suupreme Court held that public officials sued in their individual capacities for damages under Section 1983 are entitled to good faith immunity from suit unless their alleged actions

violated law which was "clearly established" at the time. Prior to Harlow, in order to establish immunity, a public official was required to prove he acted in both objective and subjective good faith. See Wood v. Strickland, 420 U.S. 308 (1975). Objective good faith required a showing that the official neither knew nor reasonably should have known his actions violated federal rights. On the other hand, subjective good faith required a showing that, regardless of what the official should have known, he did not act with malicious intent toward plaintiff or indifference toward his rights.

In Harlow, the Supreme Court rejected the subjective element requirement finding that only an objective requirement need be satisfied in order to establish good faith

immunty. Further, the Court indicated that the objective element should be analyzed in terms of whether the right allegedly violated was a clearly established right at the time of the alleged violation. In other words, an official may be heid to actual or constructive knowledge only of those rights which were clearly established at the time. The basis cf this ruling seemed to be the Court's concern that the subjective element of good faith immunity served to unnecessarily block entry of summary judgment in favor of public officials even with respect to those cases constituting insubstantial claims.[24]

---

[24]The Court stated:

The subjective element has

Further, the court adopted the "clearly established law" test primarily to shield public officials from unfair liability. Public officials should not be expected to forecast future developments in the law. The fear of changing legal interpretations and the establishment of rights not previously recognized should not be allowed to rob

---

> frequently proved incompatible with our admonition in Butz [Butz v. Economou, 438 U.S. 478 (1978)] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. (Footnote omitted.) And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

102 S.Ct. at 2737-38.

officials of flexibility in performing their duties. Harlow v. Fitzgerald, 102 S.Ct. at 2739. Consequently, in order to avoid punishing officials for subsequent developments in the law, protect flexibility and limit insubstantial lawsuits, public officials are liable only for violations of clearly established law of which they should have had notice.

Applying this test to the present case, it appears that the Board members of the State and Anderson County Department of Social Services are immune from suit. At the time of Michael Clark's death, the meaning of Section 20-7-660(A) requiring movants to "conduct training programs," having not been specifically defined, was not clearly established. Nor was there clearly established case law defining a

general due process training requirement in this area.[25] Therefore, movants are entitled to good faith immunity since the training program they provided was not in violation of clearly established law constituting reasonable notice of possible liability.

The same argument, however, cannot be made in favor of the caseworkers. The obligations of protective service caseworkers are specifically defined in Section 20-7-650. the requirements which must be satisfied are clearly established, thereby providing proper notice. Therefore, caseworkers who act in violation of these requirements

---

[25] Doe v. New York City Department of Social Services, the first directly analogous case in this field, was decided approximately one year after Michael's death.

cannot be reasonably held to have acted in "good faith". None of the purposes behind the Harlow objective good faith immunity rule would be served by such a decision. When a governmental official acts in violation of a specific statute which has a direct bearing on his official conduct and of which it is reasonable to expect him to be knowledgeable, a resulting lawsuit cannot be reasonably characterized as "insubstantial." Nor will holding that official liable in such a case constitute unfair punishment or place undesirable restraints on his flexibility.[26]

---

[26]This is not to suggest that a violation of a state statute alone may constitute a cause of action under

Therefore, in conclusion, summary judgment is entered in favor of the members of the Boards of the State Department of Social Services and the

---

Section 1983. In order to establish a claim under Section 1983, it is necessary to prove a violation of constitutional or federal statutory rights. Maine v. Thiboutot, 448 U.S. at 1. However, where a specific state statute is violated, good faith immunity will not serve as a defense to a subsequent section 1983 claim.

This Court recognizes that some may argue that good faith immunity may be established under Harlow even in the face of blatant violations of state law unless there is a corresponding "clearly established" federal statutory or constitutional right. This argument, however, is rejected by this Court on the basis that the purposes behind the Harlow decision would not be served in such a case. Further, the plain wording of Harlow does not support such an interpretation. In Harlow the Court stated:

Anderson County Department of Social Services based on the affidavits submitted by the parties and the objective good faith immunity rule created in Harlow. This same reasoning, however, does not create a basis for

---

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (Emphasis added.)

102 S.Ct. at 2738.

....

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate....(Emphasis added.)

Id. at 2739.

entry of summary judgment in favor of caseworkers personally involved in the Michael Clark investigation. Presently, it is not possible to determine from Plaintiff's Complaint which caseworkers were actually involved in the investigation of this case. Consequently, Plaintiff is given 15 days from the receipt of this Order to file a more detailed complaint against Kenneth Pryor, Dawn Hawkins, and Susan Straup, particularizing their individual involvement in the Michael Clark investigation.[27]

---

[27]All three of these defendants have a motion for summary judgment presently pending based primarily on the same grounds as the Board members. After receipt of more detailed allegations from Plaintiff, these defendants may, of course, renew their motions for summary judgment on other grounds.

Finally, the parties may now proceed with discovery, which was temporarily stayed pending the issuance of this Order.

AND IT IS SO ORDERED.[28]

s/William W. Wilkins, Jr.
United States District Judge

Greenville, S. C.
June 16, 1983.

---

[28]Plaintiff's Supplemental Memorandum dated May 17, 1983, was not considered by the Court in this Order granting summary judgment because it was not timely filed. However, it does not appear that this Memorandum would have affected the Court's decision.